TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 151.

THE CITY OF CHICAGO, PLAINTIFF IN ERROR,

vs.

CATHARINE A. TAYLOR, PERCY R. PYNE, MOSES TAYLOR PYNE, AND LAURENCE TURNER, EXECUTRIX AND EXECUTORS OF MOSES TAYLOR, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 22, 1884.

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1 Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Monday, the twenty-first day of April, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the one hundred and eighth year.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

CATHARINE A. TAYLOR, PERCY R. PYNE, MOSES TAYLOR PYNE, and Lawrence Turner, as Executrix and Executors of the Last Will and Testament of Moses Taylor, Deceased,

vs.

THE CITY OF CHICAGO.

Trespass on the case.

Be it remembered that on the eleventh day of July, A. D. 1881, came the plaintiff, by his attorneys, and filed in the clerk's office of said court his *præcipe* for a writ of summons and a bond for costs in said entitled cause, which said *præcipe* and bond are, respectively, in the words and figures following, to wit:

2 *Præcipe.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

In the Circuit Court of the United States for the Northern District of Illinois.

MOSES TAYLOR, Plaintiff, *vs.* CITY OF CHICAGO, Defendant.

Case. Damages, $25,000.00.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of trespass on the case, to the damage of said plaintiff in the sum of twenty-five thousand dollars, direct the same to the marshal of said district to execute, and make it returnable to the October term of said court, A. D. 1881.

Chicago, July 6th, 1881.

HOYNE, HORTON & HOYNE,
Pl'ff's Att'ys.

To Wm. H. Bradley, Esq., clerk of said court.

Endorsed: Filed July 11, 1881. W. H. Bradley, cl'k.

Bond for Costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

Circuit Court. October Term, A. D. 1881.

3 MOSES TAYLOR *vs.* CITY OF CHICAGO.

In case.

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him we hereby agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated this sixth day of July, A. D. 1881.

HOYNE, HORTON & HOYNE.

Endorsed: Filed July 11, 1881. W. H. Bradley, cl'k.

On the same day, to wit, on the eleventh day of July, A. D. 1881, there issued out of said clerk's office a writ of summons in said entitled cause, which said writ, together with the return of the marshal thereto attached, are in the words and figures following, to wit:

Summons.

NORTHERN DISTRICT OF ILLINOIS, ss:

Circuit Court of the United States of America.

The United States of America to the marshal of the northern district of Illinois, Greeting:

4 We command you to summon City of Chicago, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Moses Taylor of a plea of trespass on the case, to his damage, as it is alleged, of twenty-five thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 11th day of July, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the 106th year.

[SEAL.] W. H. BRADLEY, *Clerk.*

Special Deputy's Return.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

Know all men by these presents that I have appointed and by these presents do appoint George N. Jones my true and lawful deputy to execute the annexed writ, Moses Taylor *vs.* City of Chicago, and to make return of the execution thereof according to law.

A. M. JONES, [SEAL.]
U. S. Marshal for the Northern District of Illinois.

5 I have served the annexed writ in the following manner, to wit, by delivering a true copy thereof to Carter H. Harrison, mayor of the city of Chicago therein named, on the 23rd day of September, A. D. 1881.

JESSE S. HILDRUP,
United States Marshal,
By GEO. N. JONES,
Special Deputy.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

George N. Jones, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him, in addition to the fees, was actually incurred, and that the same is according to law.

GEO. N. JONES.

Subscribed and sworn to before me this 23rd day of September, A. D. 1881.

[SEAL.] SAMUEL C. HAYES,
Notary Public.

Endorsed: Filed Oct. 1, A. D. 1881. W. H. Bradley, clerk.

6 Afterwards, to wit, on the twenty-third day of September, A. D. 1881, came the plaintiff, by his attorneys, and filed in said clerk's office his declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

In the Circuit Court of the United States for the Northern District of Illinois, to the October Term, A. D. 1881.

Moses Taylor, plaintiff, who is a citizen of the State of New York, by Hoyne, Horton and Hoyne, his attorneys, complains of the city

of Chicago, a municipal corporation of and a citizen of the State of Illinois, in a plea of trespass on the case, for that whereas, at the time of the committing of the grievances hereinafter mentioned and for a long time prior thereto, the said plaintiff has been the owner and in possession of the following lot, piece, or parcel of land situate in said city of Chicago, in said district, and described as follows, to wit: The undivided three-fifths of lot number one, in block
7 fourteen, in the canal trustees' subdivision of the west half, and so much of the southeast quarter as lies west of the South Branch of the Chicago river, of section twenty-one, township thirty-nine north, range fourteen east, of the third principal meridian, said lot being, to wit, sixty feet front upon Lumber street, and, to wit, one hundred and fifty feet on eighteenth street, and, to wit, three hundred feet front upon said South Branch of the Chicago river, in said city; that the premises have improvements thereon as follows, to wit: Buildings, sheds, and machinery used in the coal business.

That said premises are upon the south side of said Eighteenth street and the east side of said Lumber street, both of which are public streets of said city, extending east and west and north and south, respectively, through the greater portion of said city.

That said Eighteenth street is a great thoroughfare of said city, having a bridge across said river, and forms a connecting link between the west and south divisions of said city of Chicago.

That the next nearest bridges across said river are a long
8 distance, to wit, four blocks, from said Eighteenth street upon either side of said Eighteenth street, and said Eighteenth street is, therefore, the outlet for a large portion of said city of Chicago; that because of the importance of said Eighteenth street as a thoroughfare the property of said plaintiff was of great value, to wit, fifty thousand dollars, it having a frontage upon said Eighteenth street of, to wit, one hundred and fifty feet and a frontage upon said Lumber street of, to wit, sixty feet at the intersection of said streets.

Yet the defendant, well knowing the premises and wrongfully contriving to injure the said plaintiff, on or about, to wit, the first day of January, A. D. 1881, constructed a viaduct or bridge in said Eighteenth street past the property of said plaintiff, cutting of- all access to said plaintiff's property from said Eighteenth street and from said plaintiff's property on Lumber street except by means of an approach so steep that it is practically useless—

By means whereof the said premises of said plaintiff have been greatly damaged and depreciated in value, to wit, more than ——
dollars, and have rendered them altogether undesirable for
9 the purposes for which the same were adopted or for any purpose whatever.

And plaintiff avers that said viaduct is built mainly of iron and masonry, with suitable approaches, and is intended by defendant as a permanent structure and improvement, and that the damage and and depreciation to said plaintiff's premises will be permanent and lasting.

And the plaintiff avers that said viaduct or bridge was built without the consent of this plaintiff and without making any compensa-

tions to the plaintiff for damages or injury so occasioned as aforesaid and without instituting any proceedings for the said damages to be ascertained, as provided by law, and the said defendant has not up to the present time made such compensation or instituted such proceedings, but refuses so to do.

And whereas also, at the time of committing the grievances hereinafter mentioned and for a long time prior thereto and from thence hitherto, the plaintiff was the owner and in possession of the following-described parcel of land situated in the city of Chicago,
10 in said county and State, to wit: The undivided three-fifths part of lot number one, in block number fourteen, in the canal trustees' subdivision of the west one-half, and so much of the southeast one-quarter as lies west of the South Branch of the Chicago river, of section number twenty-one, township thirty-nine north, range fourteen east, of the third principal meridian, said lot being, to wit, sixty feet front on Lumber street; to wit, one hundred and fifty feet front on Eighteenth street; to wit, three hundred feet front on the said south branch of the Chicago river, in said city, with the improvements thereon, consisting of buildings, sheds, and machinery used in the coal business and for wharfing and dock purposes.

That said premises are on the south side of said Eighteenth street and the east side of said Lumber street, which intersects said Eighteenth street at right angles; that said streets are both public highways in said city, and prior to the grievances hereinafter mentioned there was convenient, direct, and easy access to said premises
11 from both of said streets, which right of access or communication was of great value to the said premises, and the said premises wer- by reason thereof of great value, to wit, of the value of fifty thousand dollars.

Yet the defendant, though well knowing the premises, but contriving and intending to injure the plaintiff, on or about, to wit, the first day of January, A. D. 1881, constructed a viaduct or bridge along said Eighteenth street and thereby cut off and prevented access to said premises from said Eighteenth street, and prevented access to said premises from said Lumber street, except by way of an approach so steep that it is practically useless, and also thereby created a nuisance in thenear vicinity of said premises by reason of the noise, confusion, shaking, and dust caused by teams, cars, wagons, and other vehicles passing on and over said viaduct, and also thereby dirt, dust, filth, and other materials are and from thence hitherto have been driven and blown off the said viaduct upon said premises and into and through the buildings thereon, thereby greatly interfering with the reasonable enjoyment of said premises—

By means whereof the said premises have been greatly
12 damaged and depreciated in value and the occupants of said premises have been hindered and annoyed and the value of said premises greatly reduced.

And the plaintiff avers that no compensation has ever been made to the plaintiff by the defendant for the said damages, and that no proceedings have ever been instituted by said defendant for the purpose of having such compensation ascertained.

Wherefore the plaintiff says that he has sustained damage to the amount of twenty-five thousand dollars, and therefore he brings suit, etc.

By HOYNE, HORTON & HOYNE,
His Attorneys.

Endorsed: Filed Sept. 23, 1881. W. H. Bradley, cl'k.

13 Afterwards, to wit, on the fifth day of October, A. D. 1881, came the defendant, by its attorney, and filed in said clerk's office its plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

In the United States Circuit Court of the Northern District of Illinois. October Term, 1881.

THE CITY OF CHICAGO *ads.* MOSES TAYLOR.

And now comes the said defendant, by its attorney, Francis Adams, and defends the wrong and injury when, etc., and says that it is not guilty of the said supposed grievances laid to its charge, or any or either of them, in manner and form as the plaintiff hath in his declaration above thereof complained against it; and of this the defendant puts itself upon the country, &c.

FRANCIS ADAMS,
Def't's Attorney.

Endorsed: Filed Oct. 5, 1881. W. H. Bradley, cl'k.

14 Afterwards, to wit, on the fifteenth day of January, 1883, in the December term of said court, A. D. 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

MOSES TAYLOR *vs.* THE CITY OF CHICAGO.

Case.

Now comes O. H. Horton, the attorney of the plaintiff, and suggests to the court the death of the plaintiff, Moses Taylor, and the appointment of Catharine A. Taylor, Percy R. Pyne, Moses Taylor Pyne, and Lawrence Turner as executrix and executors of said Moses Taylor, deceased, and, on motion of said attorney, leave is given to amend the declaration and to make said executrix and executors the plaintiff- herein.

15 On the same day, to wit, on the fifteenth day of January, A. D. 1883, came the plaintiffs, by their attorneys, and filed in said clerk's office their additional counts in said entitled cause, which said additional counts are in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Circuit Court of the United States for the Northern District of Illinois. December Term, A. D. 1882.

CATHARINE A. TAYLOR, PERCY R. PYNE, MOSES TAYLOR PYNE, and Lawrence Turnure, as Executrix and Executors of the Last Will and Testament of Moses Taylor, D'c'd,

vs.

THE CITY OF CHICAGO.

Case.

And the plaintiffs, Catharine E. Taylor, Percy R. Pyne, Moses Taylor Pyne, and Lawrence Turnure, as executrix and executors of the last will and testament of Moses Taylor, deceased, who are citizens of the State of New York, by Hoyne, Horton and Hoyne, their attorneys, complain of the City of Chicago, a municipal corporation of and a citizen of the State of Illinois, in a plea of trespass on the case, for that whereas, at the time of the committing
16 of the grievances hereinafter mentioned and for a long time prior thereto, and from thence to the time of the death of said Moses Taylor, certain premises, with the appurtenances, situate in the city of Chicago in said district, to wit: The undivided three-fifths of lot number one (1), in block fourteen (14), in the canal trustees' subdivision of the west half of so much of the southeast quarter as lies west of the South Branch of the Chicago river of section twenty-one (21), in township thirty-nine (39) north, in range fourteen east, of the third principal meridian, said lot being, to wit, sixty (60) feet front on Lumber street, and, to wit, one hundred and fifty (150) feet front on Eighteenth street, and, to wit, three hundred (300) feet front on said South Branch of the Chicago river, in said city of Chicago, was in the possession and occupation of a certain person, to wit, one Robert Law, as tenant thereof to the said Moses Taylor, the reversion thereof then and during his lifetime, and at the time of the commencement of this suit and until and at the time of his death still belonging to the said Moses Taylor, to wit, at the district aforesaid; and the said premises then had and still have improvements thereon, to wit, buildings, sheds, and machinery used in receiving,
17 unloading, storing, and handling coal and in carrying on the coal business, and for wharfing and dock purposes; that said premises are on the south side of said Eighteenth street and on the east side of said Lumber street, both of which said streets are public streets in said city, extending east and west and north and south, respectively, through a portion of said city, and prior to the

grievances hereinafter mentioned there was direct and easy access to said premises from both of said streets, which access was of great value to said premises; that said Eighteenth street is a great thoroughfare in said city, with a bridge across said river, and forms a connecting link between the west and south divisions of said city; that the next nearest bridges across said river are a long distance, to wit, four (4) blocks from said Eighteenth street upon either side of said Eighteenth street, and said Eighteenth street was, therefore, the outlet for a large portion of the travel and business of said city; that because of the importance of said Eighteenth street as a thoroughfare and the access to both of said streets from said premises said property of said Moses Taylor, deceased, and his reversion therein was of great value, to wit, the value of fifty thousand dollars ($50,000.00);

18 yet the said defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said Moses Taylor in his reversionary estate and interest of and in the said premises, with the appurtenances and improvements, whilst the said premises were so in the possession and occupation of the said tenant, as such tenant thereof to the said Moses Taylor as aforesaid, and during the lifetime of said Moses Taylor and whilst he was so interested therein as aforesaid, to wit, on the first day of January, A. D. 1881, and on divers other days and times between that day and the commencement of this suit, at the district aforesaid, wrongfully and unjustly, without the leave or license of and against the will of the said Moses Taylor, constructed a viaduct or bridge in said Eighteenth street past the property of said Moses Taylor, cutting of- all access to said property from said Eighteenth street and from said property to Lumber street, except by means of an approach so steep that it is practicably useless.

And the plaintiffs aver that said viaduct is built mainly of iron and wood and masonry, with approaches thereto, and is intended

19 by defendant as a permanent structure, and that the damage to the reversionary interest of said Moses Taylor, deceased, has been, is, and will be permanent and lasting; and the plaintiffs aver that said viaduct or bridge was built without the consent of the said Moses Taylor and without compensation to said Moses Taylor in his lifetime, or to the plaintiffs since his death, for the damage so occasioned as aforesaid, and without instituting any proceedings for the ascertaining of the said damages as provided by law, and the said defendant has not up to the present time made such compensation or instituted such proceedings, but refuse- so to do.

By means of which said several premises the said Moses Taylor in his lifetime was greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said premises, with the appurtenances, so in the possession and occupation of said Robert Law as tenant thereof to said Moses Taylor as aforesaid, to wit, at the district aforesaid.

Wherefore the plaintiffs say that they have sustained damages as executrix and executors as aforesaid to the amount of twenty-five thousand dollars ($25,000.00), and therefore they bring their suit, etc.

20 And the said plaintiffs bring into court here letters testamentary of the said Moses Taylor, deceased, whereby it fully appears to the said court here that the said plaintiffs are executrix and executors of the said last will and testament of the said Moses Taylor, deceased, and have the execution thereof, etc.

HOYNE, HORTON & HOYNE,
Plaintiffs' Attorneys.

Endorsed: Filed Jan'y 15, 1883. Wm. H. Bradley, clerk.

21 Afterwards, to wit, on the seventeenth day of March, A. D. 1884, came the plaintiffs, by their attorneys, and filed in said clerk's office their additional counts in said entitled cause, which said additional counts are in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

Circuit Court of the United States, Northern District of Illinois.
December Term, A. D. 1883.

CATHERINE A. TAYLOR, PERCY R. PYNE, MOSES TAYLOR PYNE, and Lawrence Turnure, as Executrix and Executors of the Last Will and Testament of Moses Taylor, Deceased,

vs.

THE CITY OF CHICAGO.

Case.

And the plaintiffs, Catherine A. Taylor, Percy R. Pyne, Moses Taylor Pyne, and Lawrence Turnure, as executrix and executors of the last will and testament of Moses Taylor, deceased, who are citizens of the State of New York, by Horton, Hoyne & Saunders, their attorneys, complain of the City of Chicago, a municipal corporation and a citizen of the State of Illinois, in a plea of trespass on the case:

22 For that whereas, at the time of the committing of the grievances hereinafter mentioned and for a long time prior thereto, and from thence to the time of the death of the said Moses Taylor, certain premises, with the appurtenances, situate in the city of Chicago, in said district, to wit, the undivided two-fifths (⅖) part of lot number one (1), in block fourteen (14), in the canal trustees' subdivision of the west half and so much of the southeast quarter (¼) as lies west of the South Branch of the Chicago river, in section twenty-one (21), in township 39 north, in range fourteen (14) east, of the third (3rd) principal meridian, said lot being, to wit, sixty (60) feet front on Lumber street and, to wit, one hundred and fifty (150) feet front on Eighteenth street and, to wit, three hundred (300) feet front on said South Branch of the Chicago river, in said city of Chicago, were in the possession and occupation of a certain person, to wit, one Robert Law, as tenant thereof to

the said Moses Taylor, the reversion thereof then and during his lifetime and at the time of the commencement of this suit and until and at the time of his death still belonging to the said Moses Taylor, to wit, at the district aforesaid; that the said premises then had and still have improvements thereon,
23 to wit, buildings, sheds, and machinery used in receiving, unloading, storing, and handling coal and in carrying on the coal business and for wharfing and dock purposes, which said buildings and improvements at the time of the committing of the grievances hereinafter mentioned belonged to and were the property of the said Moses Taylor in the same proportion that said premises belonged to said Taylor; that said premises are on the south side of Eighteenth street and on the east side of said Lumber street, both of which said streets are public streets in said city of Chicago, extending east and west and north and south, respectively, through a portion of said city, and prior to the grievances hereinafter mentioned there was direct and easy access to said premises from both of said streets, which access was of great value to said premises; that said 18th street was and is a great public thoroughfare of said city, and at the time of the committing of the grievances hereinafter mentioned there was a bridge across said river at said 18th street, which formed a connecting link between the west and south divisions of said city of Chicago; that the nearest bridges across said river were a long distance, to wit, four (4) blocks, from
24 said 18th street, and said 18th street was and is the outlet for a large portion of the travel and business of said city; that because of the importance of said 18th street as a thoroughfare and of the location of said premises upon the west bank of the South Branch of the Chicago river and the access to both of said streets from said premises said property of said Moses Taylor, deceased, and his reversion therein, was of great value, to wit, the value of fifty thousand dollars ($50,000.00); yet the said defendant, well knowing the premises, and contriving and wrongfully and unjustly intending to injure, prejudice, and ag-rieve the said Moses Taylor in his reversionary estate and interest of and in the said premises, with the appurtenances and improvements, whilst the said premises were so in the possession and occupation of the said tenant, as such tenant thereof to the said Moses Taylor as aforesaid, and during the lifetime of the said Moses Taylor, whilst he was so interested therein, to wit, on the first (1st) day of April, A. D. 1879, and on divers other days and times between that day and the commencement of this suit, to wit, at the district aforesaid, wrong-
25 fully and unjustly, without the leave or license of and against the will of the said Moses Taylor, constructed a viaduct or bridge in said 18th street, past the property of said Moses Taylor, cutting off all access to said property from said Eighteenth street and obstructing the said Eighteenth street and interfering with its use as a public highway, and constructed in connection with said viaduct a roadway or approach in said Eighteenth street and on the south side thereof extending from said Lumber street, along the north side of said premises, up

to said viaduct, said approach being of the width of about twenty (20) feet and being an incline so steep and narrow that it is practically useless as a means of approach to said viaduct and to said Eighteenth-street bridge; and the plaintiffs aver that said approach is so constructed as to cut off all access from said premises to said Eighteenth street and to said viaduct upon the level of said viaduct, and is a barrier and obstruction in said Eighteenth street between the said premises and the said viaduct, and by reason of the construction of said viaduct in said Eighteenth street the dirt, dust, and other materials are thrown and shaken down onto
26 the said premises and the water is turned off of said viaduct and down said approach and onto the said premises, thereby flooding said premises and interfering with the use and occupation thereof and thereby rendering the same practically useless for use and occupation for wharfing purposes and the purpose of carrying on the business of handling and storing coal, stone, or other material and greatly depreciating the value of the reversionary interest of the plaintiffs therein.

And the plaintiffs aver that said viaduct and said approach are built mainly of iron, wood, and masonry, and are intended by defendant as permanent structures, and that the damage to the reversionary interest of the said Moses Taylor, deceased, has been, is, and will be permanent and lasting; and the plaintiffs aver that said viaduct or bridge and said approach were built without the consent of the said Moses Taylor and without making any compensation to the said Moses Taylor in his lifetime or to the plaintiffs since his death for the damage so occasioned as aforesaid and without instituting any proceedings for the ascertainment of said damages,
27 as provided by law, and defendant has not up to the present time made such compensation or instituted such proceedings, but refuses so to do.

By means of which said several premises the said Moses Taylor in his lifetime was greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said premises, with the appurtenances, so in the possession and occupation of the said Robert Law as tenant thereof to said Moses Taylor, as aforesaid, to wit, at the district aforesaid.

Wherefore the plaintiffs say that they have sustained damage as executrix and executors as aforesaid to the amount of twenty-five thousand dollars, and therefore they bring their suit, etc., and the said plaintiffs bring into court here the letters testamentary of the said Moses Taylor, deceased, whereby it fully appears to the said court here that the said plaintiffs are executrix and executors of the last will and testament of the said Moses Taylor, deceased, and have the execution thereof, etc.

2nd count. For that whereas also, at the time of the committing of the grievances hereinafter mentioned and for a long time prior thereto, and from thence to the time of the death of the said Moses Taylor,
28 certain premises, with the appurtenances, situated in the city of Chicago, in said district, to wit, the undivided three-fifths (⅗) of lot number one (1), in block fourteen (14), in the canal trustees'

subdivision of the west half (½) and so much of the southeast quarter (¼) as lies west of the South Branch of the Chicago river, of section twenty-one (21), township thirty-nine (39) north, range fourteen (14) east, of the third (3rd) principal meridian, said lot being, to wit, sixty (60) feet front on Lumber street and, to wit, one hundred and fifty (150) feet front on Eighteenth street and, to wit, three hundred feet front on said South Branch of the Chicago river, in said city of Chicago, were in the possession and occupation of a certain person, to wit, one Robert Law, as tenant thereof to the said Moses Taylor, the reversion thereof then and during his lifetime and at the time of the commencement of this suit and until and at the time of his death still belonging to the said Moses Taylor, to wit, at the district aforesaid; that the said premises then had and still have improvements thereon, to wit, buildings, sheds, and machinery used in receiving, unloading, storing, and handling coal and in carrying on the coal business and for wharfing and dock purposes;
29 that said premises are on the south side of said Eighteenth street and on the east side of said Lumber street, both of which said streets are public streets in said city of Chicago, extending east and west and north and south, respectively, through a portion of said city, and prior to the grievances hereinafter mentioned there was an approach extending from Lumber street along the south side of 18th street up to and connecting with the viaduct on said 18th street; that said 18th street was and is a great thoroughfare of said city of Chicago, with a bridge across said river, which was of great value to said premises; that because of the importance of said 18th street as a thoroughfare and the access to said street from said Lumber street by means of said approach said property of said Moses Taylor and his reversionary interest therein was of great value, to wit, the value of thirty thousand dollars ($30,000.00).

Yet the said defendant, well knowing the premises and contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said Moses Taylor in his reversionary estate and interest of, in, and to the said premises, with the appurtenances, and
30 improvements whilst the said premises were so in the possession and occupation of the said tenant as said tenant thereof to the said Moses Taylor as aforesaid and during the lifetime of said Moses Taylor whilst he was so interested therein as aforesaid, to wit, on the first (1st) day of January, A. D. 1881, and on divers other days and times between that day and the commencement of this suit, at the district aforesaid, wrongfully and unjustly and without the leave or license of and against the will of said Moses Taylor caused the said viaduct and approach to the same in said 18th street to be raised above its then level, to wit, three (3) feet, and in connection with said viaduct also caused the said approach to be changed and raised so as to make the grade or ascent steeper than it was before, and so changed the level of said approach at the foot thereof at Lumber street and raised the grade of said Lumber street at the foot of said approach as to make said approach practically useless as an approach to said viaduct and to cut off all access to said property from said Eighteenth street except by said approach, and the plain-

tiffs aver that by reason of said change and the raising of
31 the grade of said viaduct and bridge and of said approach
and damage to the reversionary interest of said Moses Taylor, deceased, has been and is and will be permanent and lasting, and the plaintiffs aver that by reason of the location of said premises on the bank of said river and by reason of the surroundings of said premises the same can only be used for dock purposes and for the storing and handling of coal, stone, or other heavy material, and that the building of the said viaduct and approach and the raising of the grade of the same has rendered said premises practically useless for the purposes aforesaid by reason of the difficulty and expense which must necessarily be caused in removing coal, stone, and other material from said premises, and that by reason of the construction of said viaduct in said Eighteenth street the dirt, dust, and other materials are thrown and shaken down on the said premises and the water turned off of said viaduct and down said approach and onto the said premises, thereby flooding said premises
and interfering with the use and occupation thereof and ren-
32 dering the same practically useless for use and occupation for wharfing purposes and for the purpose of carrying on the business of handling and storing coal, stone, and other material, and greatly depreciating the value of the reversionary interest of the plaintiffs therein, and the plaintiffs aver that said viaduct, bridge, and approach were raised without the consent of said Moses Taylor and without any compensation to said Moses Taylor in his lifetime or to the plaintiffs since his death for the damage so occasioned as aforesaid and without instituting any proceedings for the ascertainment of the said damages as provided by law, and the said defendant has not up to the present time made such compensation or instituted such proceedings.

By means of which said several premises the said Moses Taylor in his lifetime was greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said premises, with the appurtenances, so in the possession and occupation of the said Robert Law as tenant thereof to said Moses Taylor as aforesaid, to wit, at the district aforesaid.

Wherefore the plaintiffs say that they have sustained dam-
33 ages as executrix and executors as aforesaid to the amount of twenty-five thousand dollars ($25,000.00), and therefore they bring their suit, etc.

And the said plaintiffs bring into court here the letters testamentary of the said Moses Taylor, deceased, whereby it fully appears to said court here that the said plaintiffs are executrix and executors of the last will and testament of the said Moses Taylor, deceased, and have the execution thereof, etc.

HORTON, HOYNE & SAUNDERS,
Plaintiffs' Att'ys.

Endorsed: Filed March 17, 1884. Wm. H. Bradley, clerk.

34 On the same day, to wit, on the seventeenth day of March, in the adjourned March term of said court, A. D. 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

CATHARINE A. TAYLOR, PERCY R. PYNE, MOSES TAYLOR PYNE, and Lawrence Turner, as Executrix and Executors of the Last Will and Testament of Moses Taylor, Deceased,

vs.

THE CITY OF CHICAGO.

Trespass on the case.

Now come the parties, by their respective attorneys, and upon issue joined herein thereupon comes a jury of good and lawful men, to wit, C. C. Wilcox, R. V. Stocking, Edward Bohanan, William Dodds, L. P. Narramore, D. W. Cresey, Charles Lucus, John Dowing, C. G. Pettibone, Augustus Nord, F. W. Noble, and Oliver Baker, who were all duly elected, tried, and sworn well and truly to try said issue; and after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

35 Afterwards, to wit, on the eighteenth day of March, in the adjourned March term of said court, A. D. 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

CATHARINE A. TAYLOR *et al. vs.* THE CITY OF CHICAGO.

Trespass on the case.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn; and after hearing the concluding evidence and the arguments of counsel, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the nineteenth day of March, in the adjourned March term of said court, A. D. 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

CATHARINE A. TAYLOR *et al. vs.* THE CITY OF CHICAGO.

Trespass on the case.

36 Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after receiving the instructions of the court the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit: We, the jury, find the defendant guilty and assess the plaintiffs' damages at six thousand and eight hundred dollars.

And thereupon the defendant, by its attorney, moves the court for a new trial herein.

Afterwards, to wit, on the eleventh day of April, in the adjourned March term of said court, A. D. 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

CATHARINE A. TAYLOR *et al. vs.* THE CITY OF CHICAGO.

Trespass on the case.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendant heretofore entered herein for a new trial of this cause, and after hearing the arguments of counsel the court takes the same under advisement.

37 Afterwards, to wit, on the twenty-first day of April, in the adjourned March term of said court, A. D. 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

CATHARINE A. TAYLOR, PERCY R. PYNE, MOSES TAYLOR PYNE, and Lawrence Turner, as Executrix and Executors of the Last Will and Testament of Moses Taylor, Deceased,

vs.

THE CITY OF CHICAGO.

Trespass on the case.

Now comes the defendant, by its attorneys, and the court, having considered and being now fully advised, upon the motion of the defendant heretofore entered herein for a new trial of this cause, over-

rules the same and awards judgment. It is thereupon considered and adjudged by the court that the plaintiffs do have and recover of the defendant the said sum of six thousand and eight hundred dollars, their damages so as aforesaid assessed, together with their costs in this behalf expended, amounting to —— dollars and —— cents.

38 On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Circuit Court Thereof.

MOSES TAYLOR *vs.* THE CITY OF CHICAGO *et al.*

Be it remembered that heretofore, to wit, on the 17th day of March, A. D. 1884, the above-entitled cause came on for a hearing before the Honorable Henry W. Blodgett, sitting as judge of said court, and a jury, and the following proceedings were had:

Plaintiffs offered in evidence a warranty deed, dated May 2nd, 1870, from Charles Bradley and wife to Moses Taylor and others, conveying certain undivided fifths of lot 1, block 14, canal trustees' subdivision of part of the west half of the southeast quarter of section 21, township 39 north, range 14 east, of the third principal meridian, of which two-fifths were conveyed to Moses Taylor.

39

Also a deed from the Pittston and Elmira Coal Company and others to Moses Taylor, dated January 4th, 1881, conveying an undivided one-fifth of said lot.

Also a certified copy of the letters to the plaintiffs as executors of Moses Taylor, deceased, issued by the surrogates court of New York.

Also a certified copy of an ordinance of the city council of the city of Chicago, passed April 15th, 1878, providing for the construction of said viaduct.

40 *City Ordinance of April 15, 1878.*

Whereas, on the 22nd day of March, A. D. 1876, the city council of the city of Chicago did make an appropriation towards the erection of a viaduct over the tracks of the Pittsburgh, Fort Wayne and Chicago Railway Company at Eighteenth street, in said city of Chicago; and

Whereas the Pennsylvania Company, lessee of the Pittsburgh, Fort Wayne and Chicago railway, through its general manager, has agreed in writing to pay on account of said improvement an aggregate sum of fourteen thousand dollars ($14,000): Therefore

Be it ordained by the city council of the city of Chicago—

SECTION 1. That the department of public works is hereby directed to proceed to erect and complete within one year from the

passage of this ordinance a good and sufficient viaduct, with stone abutments and iron frame-work, over the tracks of the Pittsburgh, Fort Wayne and Chicago Railway Company at Eighteenth street, in said city, provided the said railway company shall agree by consenting to this ordinance, through its authorized officer, to pay in monthly installments upon the estimate of said department of public works and of the chief engineer of said railway company, to be issued as the work progresses, an aggregate sum of fourteen thousand dollars ($14,000).

41 SECTION 2. That said viaduct shall be built under the joint superintendence of said department of public works and chief engineer of said railway company in accordance with the plans and specifications now on file in the office of said department of public works.

SECTION 3. All expenses of every nature and kind in excess of said fourteen thousand dollars ($14,000) shall be borne by the said city of Chicago. Said city shall maintain the approaches to and floor of said viaduct at its own expense, and also do all ordinary repairs. The said city of Chicago shall save the said railway company harmless for any claim for damages by any person injured through the erection of said viaduct and from all expenses connected with the erection of the same exceeding said sum of fourteen thousand dollars ($14,000): Provided, however, That said chief engineer's services shall be rendered at the expense of said railway company.

SECTION 4. This ordinance shall be in force from and after the acceptance of the provisions hereof by said railway company by its authorized officer or officers.

STATE OF ILLINOIS, }
County of Cook, City of Chicago, } *ss:*

42 I, John G. Neumeister, city clerk of the city of Chicago, do hereby certify that the above and foregoing is a true and correct copy of an ordinance passed by the city council of said city April 15th, 1878, and approved April 17th, 1878; that the original of said ordinance is now in my possession and on file in my office.

In witness whereof I have hereunto set my hand and cause- to be fixed the corporate seal of the city of Chicago this 1st day of February, A. D. 1884.

[Seal of the City of Chicago, Ills.]

JOHN G. NEUMEISTER,
City Clerk.

Also an ordinance passed by the city council of the city of Chicago, March 7th, 1881, relating to the raising of said viaduct:

43 *Ordinance Authorizing the Chicago and Western Indiana Railroad Company to Raise the Eighteenth-Street Viaduct.*

Be it ordained by the city council of the city of Chicago—

SECTION 1. That permission and authority be, and the same are hereby, granted to the Chicago and Western Indiana Railroad Com-

pany to raise the present bridge crossing the South Branch of the Chicago river at Eighteenth street, not to exceed three and one-third (3⅓) feet higher than it now is, and erect at the east end of said bridge a suitable viaduct fifty-eight (58) feet long; and the authority and permission is hereby further granted to said Chicago and Western Indiana Railroad Company to raise the approaches at both ends of said bridge; also the approach from Lumbar street, to connect with the west approach aforesaid, to the necessary grade, as appears by the profile plan, marked B, now in the office of the department of public works of said city. All of the material to be used in making said changes and erecting said viaduct is to be of wood: Provided, and this is upon the express condition, That the raising of said bridge, the building of said viaduct, together with all of
44 the said approaches, shall be at the expense and costs of said company.

* * * * * * *

SECTION 5. This ordinance is granted upon the further express condition that it shall be formally accepted by the Chicago and Western Indiana Railroad Company within ten days after its passage, and that the work herein authorized shall be done and completed within six months from the passage of the ordinance, otherwise all rights and privileges herein granted shall cease and be null and void; also a certified copy of the acceptance by the Chicago and Western Indiana Railroad Company of the ordinance last introduced in evidence.

45 Chicago and Western Indiana R. R. Co.; secretary's office, 125 Dearborn street; H. G. Stone, secretary.

CHICAGO, *March* 11, 1881.

To the mayor and city council of the city of Chicago.

GENTLEMEN: The Chicago and Western Indiana Railroad Company hereby accepts the ordinance relating to said company & passed by you March 7th, A. D. 1881.

[SEAL.] CHICAGO AND WESTERN INDIANA RAILROAD COMPANY,
By J. B. BROWN, *President.*

Attest: H. G. STONE, *Secretary.*

STATE OF ILLINOIS, }
County of Cook, City of Chicago, } ss:

I, John G. Neumeister, city clerk of the city of Chicago, do hereby certify that the above and foregoing is a true and correct copy of the acceptance of an ordinance relating to the raising of 18th-St. bridge and the building of a viaduct, passed by the city council March 7th, 1881, and that the original is now on file in my office.

Witness my hand and the corporate seal of said city this twenty-first day of February, A. D. 1884.

[SEAL.] JOHN G. NEUMEISTER,
City Clerk.

(Endorsed:) Doc. No. 1779. C. & W. I. R. R. Co. Acceptance of ordinance in re. 18th-St. bridge. Filed Mar. 14, 1881. P. J. Howard, city clerk.

46 Objection offered by the defendant to the foregoing evidence as being incompetent under the declaration. Objection overruled, except as to ordinance of March 7, 1881, all of which was excluded, except the first and fifth sections. Exception by the defendant.

47 ROBERT LAW, called on behalf of the complainants, testified as follows:

I am engaged in the coal business in Chicago, and have resided here about thirty years. I am familiar with the property in question, and am in possession of it. I took possession of it one or two years after 1870, and have been in possession ever since, and have paid the taxes during that time for the different interests that were owned. I have owned one-fifth of the property and leased the balance.

The viaduct was built in 1879 or 1880. There are sheds, machinery, engines, and boilers on this property and tracks above for moving the coal. This was the condition when this improvement was made.

After the viaduct was built there was a change made in the street, in the grade. Before the bridge was raised Lumber street was a little below the scales and our front door; perhaps 10 or 12 inches. The raising of the bridge necessitated the raising of the street, and they have raised it up so we cannot get out of our yard now with a loaded team in bad weather. We get on the scales and back out of
48 the yard and go another way out. This is on Lumber street. We cannot cross Lumber street, and we cannot enter from 18th street. It is cut off by the approach to the bridge.

Photograph introduced in evidence of Lumber St. & of Eighteenth street in front of the property in question & of the property opposite this property on 18th street, taken before the viaduct was built.

Objected to; objection overruled; exception on behalf of defendant.

Map showing a profile of grade at 18th-street bridge and viaduct.

(Here follows diagram marked p. 49.)

50 Objected to.

I think the mat is correct in the elevation; the distance from the river to the bridge I have not measured. I have an engineer to do that for me. It approximates so closely to being correct that I can discover no difference from the map and the original. It represents on paper just as it appears to the eye to a person on the ground. Since I have been in possession the lot has been used for storing coal. The improvements on the property are owned in the

same proportion that the lot is and by the same owner. There
51 is a shed on the lot, 150 feet wide and 250 to 260 feet deep, covering the entire lot. There are one or two tracks on the river front, platform, derricks, and other things with which to handle coal. The improvements were new the year before the construction of the viaduct.

Q. Then, from your knowledge of it, just say what they were worth.

A. Well, the entire thing cost nearly seven——

Objected to; objection overruled; exception on behalf of defendant.

Q. What did they cost?

A. They cost over $7,000—the improvements on that lot.

Q. What were these improvements worth, to take off from that property?

Objected to on the ground that no necessity or reason is shown for taking them off. Objection overruled and exception by the defendant.

A. We could not use them at all if taken off. The split-ing up of the lumber and taking it down would not leave it worth 20 per cent. of the cost. The incline of the approach from Lumber street to the bridge, I think, is about one foot in 17.

Q. As to the access to the property, state whether or not it is easy of access to loaded teams.

52 Objected to; objection overruled; exception by the defendant.

A. No; it is not easy of access. The grade is so steep that in slippery weather you can scarcely go up without doubling teams. We lost our trade that we had there to a large extent. They won't come there because they cannot get out with full loads. It is out off from 18th street entirely, and they have got to go around and go back the same way to get on the viaduct. It has raised it in front of our office so that we cannot get out of the yard unless we make the approach back 50 or 75 feet and take the west half of the yard to make an approach.

Q. What is the effect of this—the building and raising of this viaduct—as to turning water upon it?

Objected to on the ground of being incompetent; objection overruled; exception by the defendant.

A. Lumber street, which was 10 inches below our yard before—when the bridge was raised in 1880 or 1881 they had to go back to the extreme west end of Lumber street to get a grade that
53 would get out. This was due west. In order to do that they also went onto Lumber street there and raised it in front of the lot, and they sloped it down—sloped the street down, so that every shower of rain that comes floods our scales and covers them

up. We have got coal there two or three feet frozen solid from the water running in there, and that we have got to thaw out, and for my business it injures it in that respect very badly. The water comes through the cracks in the viaduct. There is a little pitch downward, going west. After we get on the center there is a big pitch. There used to be a small one before, but now it is nearly level. Before these improvements were made the water from our yard ran into the street gutter. Between Lumber street and the river the viaduct is supported on iron tiers. When you strike parallel with Lumber street then it is on piles.

It is admitted that Lumber street and 18th street and Stewart avenue are public streets in this city of Chicago, and that the
54 city constructed the viaduct in question.

There is a bridge across the river at 18th street, and the nearest bridge on the south is the 22nd street, and on the north 12th street. Before the viaduct was constructed there was a good deal of travel. It may have increased with teams, particularly going west, but I think it is about the same.

Q. Has or not the trade conducted upon this property been effected by the improvement?

Objected to; objection overruled; exception by the defendant.

A. Yes, sir; very much.

Q. In what respect—improved or otherwise—damaged?

Objected to as incompetent; objection overruled; exception by the defendant.

Q. Our sales are not 20 per cent. what they were before the viaduct was built; our books will show it, and I can prove it by my clerk.

Motion to strike answer out as not being responsive and as being incomp-tent and not formed upon a proper bases. Motion overruled and exception on behalf of the defendant.

I *am* familiar with the value of this property at the time the improvements were made in the streets. The value of lot 1,
55 judging for the estimate and inventory to our people which I have to do every year—make an inventory of the property——

Objected to; objection overruled; exception by the defendant.

A. $400 a foot river front; the river front is about 167 feet. My estimate of value *is* the river front — $400 a foot for the 167 feet; my estimate is without the improvement.

Q. What was the property worth after the street changes were made—immediately after—as effected by the construction of the viaduct?

Objected to as incompetent; objection overruled; exception by defendant.

—. It destroys more than 50 per cent. of the value of the property. The value of the property was diminished about 12 or 15 per cent. by the raising of the grade after the construction of the viaduct. My reasons are these: I could not rent it to any one for any purpose; it was being covered with water, and in the winter time it is almost impossible to get out with teams. I have tried to sell it since the viaduct was built and I cannot get an offer for it, while before I could sell it, and had offers for it. The adjoining lot to this I paid
$3,000 a year rent for. After the viaduct was built I rented
56 it for a thousand dollars. Prior to the construction of the viaduct I was instructed to offer the ower of lot 2, adjoining the lot in question, $40,000 for his property. I did not offer it myself, but I think I could prove that other parties did that are here, afterwards. After the viaduct was built I bought the lot for $28,000. I did not myself offer the owner of lot 2 $40,000 before the viaduct was built for his property, but other parties did, and I bought it after the viaduct was built for $28,000. I will produce the man who stated the offer of $40,000 had been made, in a few minutes, if you want him.

The testimony of the witness in regard to the offer of $40,000 for lot 2 objected to by the defendant as being incompetent and hearsay.

Objection overruled; exception by the defendant.

Plaintiff offers in evidence a sketch of the property in question.

See stipulation, page 163.

57 Cross-examination:

I have been on the lot in question since 1870, and was south of it, on lot 2, for four or five years, and have been there ever since. I couldn't tell whether it was since 1872 or 1873 that I got possession of the property. There was a bridge across the river at 18th street; tugs could not pass under it, and they raised it subsequently. That was about the time that I bought. The approach to that bridge was little above my property. It was along a level with the lot, about half way up, almost. At the west end and on Lumber street the approach was below our office front door, but as you gradually climbed up to the bridge there was a climb all the way up. We were about 6 to 10 inches above Lumber street. In starting from Lumber street here since this time the railroad covered this lot with tracks, and they have built a solid wall around me.

The grade to raise to this bridge at the time the viaduct was built in 18th street commenced a little beyond our office, east.

The grade of the approach commenced at Lumber street to
58 go up to the bridge. I do not think the bridge was more than ten feet above the dock—10 or 12 feet—and there was an approach down to Lumber street or very close to Lumber street. It was a plank approach until you got to the street. That plank approach was laid when the original viaduct was built. The great change in this approach was when they raised the bridge, two or three years ago. We now drive down a little narrow lane here (indicating) 18 or 20 feet wide. There is a narrow sidewalk on it. I

think the viaduct is about twice as wide as the approach we have. In 1870 lot 2 was owned by the Dalton family and rented by me of them. I bought it about 1880, after the viaduct was built and before the bridge was raised. There are varying interests in the ownership. I rented lot from about 1870 for 5 years at $3,000 a year. In 1875 or 1876 I paid $2,500, and it ran at that rate for about three years. In 1879 I cut it down to $2,000. In 1880, after the contract for the viaduct was let, I pulled it to $1,500, and the year the viaduct was built or the year after it was reduced to $1,000. The last year they had it I paid them a thousand. When we purchased the lot I got one-fourth, and I pay rent to my co-tenants at the rate of 6 per cent. on the cost. The viaduct was
59 built when I bought it. It was in progress before our present approach was built; the approach commenced on a level with the railroad track on Lumber. I think there is from 10 to 14 tracks on Lumber street. There are tracks right next to my property and extending across 18th street. Stewart avenue and Lumber street run into together south of me. The tracks occupy the space of ground between Stewart avenue and Lumber street, as well as a part of Stewart avenue. Between the foot of the approach to the bridge at Lumber street and across Stewart avenue I think there is from 10 to 13 tracks. My impression is there was not half that number at the time the viaduct was built. We had no trouble getting across and consequently I never investigated it. We used to cross them with our teams, but now it is all filled with tracks. I don't think there was any change made in the approach to the bridge at the time the viaduct was built—in the grade. The condition of the approach was substantially the same at that time that it was up to the time the change was made in the grade. The old bridge
60 was made higher ten or twelve years ago.

Q. Now, from the time the change was made, the time that bridge was raised, and that approach was built to that bridge running from Lumber street to 18th street, was there any change made up to the time in 1881 they raised the bridge?

A. I don't remember; my impression is there was none made from the time it was made for what we call tug bridges, that they might go under it, until 1881. When the viaduct was built the injury to my property was in carrying the travel over the high place above the approach where they would call into my office, making in front of me a switching ground, so that we could not get across. The railroad company shut me off from getting out in that direction. We used to *to* use 18th street as an outlet. There were probably four or five, might have been six, tracks in front of me. There is a pier for the viaduct adjoining Lumber street on the west; there are no tracks east of that pier. There is another pier to the
61 east of that parallel with the street. I do not know how far it is from my lot line to the nearest railroad track in front of me. We have a drive between our yard and the track; that drive is in Lumber street; they are within 30 or 40 feet from my sidewalk.

Q. Now, in what, in your opinion, consist the damage; what is the

cause of the injury which you think was done to your property, to that property, by the construction of the viaduct?

A. People that used to go past my office, direct on the level ground, would drop in and order coal. They now go above me. I don't know how much above; the viaduct is nearly on a level with our chimney top on our office; we are down in the cellar. They won't go to 18th-street bridge and go back again. Parties going down with teams make it more objectionable now because they can't cross on 18th street and Stewart avenue; they have to go back around by the bridge again, and people won't go there, and they don't go to my office. That is the principal element of damage to the lot. I don't know
62 how much the grade was raised; I think it 17 in 100 now; before it was nearly 30 in 100. Before 1881 it was one in 30, and now it is 1 in 17—that is, from my scales in the yard down to that approach up to the bridge it is about twice as bad now as it was from the entrance of Lumber street from where 18th street strikes Lumber street and the approach proper commences. Lumber street opposite my property is higher than it was; I cannot tell you the difference, except that we cannot climb out from our scales onto Lumber street in bad weather without backing around and going the other way; before it was a little decline—6 to 10 inches. I have put new docks in since the bridge was completed. The element of damage, in my mind, which leads me to say there was 15 per cent. of the value of the property taken off by the raising of the bridge and the approach to it, is because we cannot get out of the yard with the loads. On the west side of Lumber street the difficulty is increased more than on our side or the east end of the river. If you cross the bridge in going down with a loaded team you can-
63 not stop; it is so dangerous there with a full load it is almost impossible to stop a team. The rising of the bridge has injured both sides, because it has made it so much steeper. It must have added from 25 to 33 per cent. almost of the grade on the east side of the river. On the west side of the river the only difference is we could pull up with full loads before without any trouble, and now we cannot get up without doubling teams sometimes. Getting out of our yard on Lumber street is the principal trouble. From Lumber street onto the bridge the street is steeper than it was before. I think the property would have sold for $400 a foot in 1878. I think it was damaged more than 50 per cent. immediately after the viaduct was built.

Q. Now, I ask you what you think was the value of that property immediately before this bridge was raised?

A. What, from the lowest grade do you mean?

Q. I mean immediately before the bridge was raised in 1881.

A. Well, the principal damage, as I told you before——
64 Q. Oh, just tell me what the property is worth.

A. I think it was damaged undoubtedly; the only way you can compute that is—it was certainly damaged over 40 and, I think, 50 per cent. If it was 40 it would be $160 per foot. If I figure it was worth $400 a foot, and it was damaged 50 per cent. it would be worth only $200, and if it was damaged 10 to 12 per cent. by the

raising of the bridge deduct it from that and it will show you the amount. I could not have got $200 a foot for it after the viaduct was built. Before the bridge was raised I might have got $250 a foot for it. I think the property was damaged from 62 to 65 per cent. by the building of the viaduct and the raising of the bridge, 50 per cent. by the building of the viaduct and 12 to 15 by the raising of the bridge. The piece right adjoining south of me has been for sale for some years; two years anyhow. The approach was substantially the same both before and after the building of the viaduct.

65 There was very little difference; it might have been a foot or two, but not enough to materially affect us. The principal damage to the property is because people won't go down to my office. It would be possible to take my office just as it is and put it on a brick foundation up to the bridge in order to take my orders right on a level with the viaduct, if they would take the bridge house away, but then I would have to give all of a portion of the yard for a driveway. I could put a little office up there to receive orders on the corner of my lot on the level with the viaduct. I have another office down-town where I take the most of my orders. At an early day and before this viaduct was built I could retail all the coal I could stock in those yards. I could put an office up there on stilts in that corner at from one to three thousand dollars. It may be that the traffic has increased across 18th street since the viaduct was built. If it has it would benefit me if I had my office up there in that corner. Between the west end of the bridge and where the incline down to Lumber street commences there is no room for teams

66 to stand, not over 10 to 12 feet. It is occupied by teams crossing, and there is where we stick all the time. There is a bridge house there on the south side of 18th street and just where counsel was asking me if I could put an office. It is occupied by the city. The viaduct extends clear over Lumber street and Stewart avenue and comes to grade at Canal street. The railroad trains run under the viaduct on Stewart avenue and on Lumber street. There is a driveway between my yard and the viaduct; they left me a drive of 20 feet there, and my yard comes up to that driveway, square with it. Between the viaduct and my yard is a place 18 or 20 feet wide that comes down below; my chimney is on top with the viaduct.

67 LYMAN BAIRD, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

In the real estate business in Chicago and have been for 25 years. I am familiar with the property in question and have recently examined it with a view of seeing what damage there was in consequence of the viaduct, and so forth. I have had experience in charge of property similarly situated and have formed an estimate of the value of the property, just preceding the building of the viaduct in 1878 and 1879, and, in my opinion, the property was worth $46,000. It was damaged decidedly by the building of the viaduct. I think it was worth 50 per cent. less by reason of the construction of the viaduct as it is now.

Cross-examination:

I had a general knowledge of this property before the viaduct was constructed. I did not have charge of any property nearer than 22nd street. I think I know the condition of 18th street prior to the construction of the viaduct. It was up an easy grade from
68 Lumber street to the bridge. I don't know whether there was any change made in the bridge by reason of the viaduct being built. I have not estimated my damages on a change in the bridge; I base it on the way it was previous to the viaduct and the way I see it now. I think it would make some difference, the change in the grade. This property has an access to the bridge now and had after the viaduct was built and before the bridge was raised. I understand that after the construction of the viaduct there was no change in the grade going up to the bridge from this property until the bridge was raised after the viaduct was built. I have not considered the effect of the building of the viaduct proper, leaving out the question of raising. I don't think I am familiar with the raising of the grade at the time the bridge was raised. Teams can probably pass if they are not too widely loaded on this roadway that has been left from the bridge down to Lumber street. The major part of the street was destroyed. I think the large damage is
69 in taking away two-thirds of the street and more, if I understand it, and leaving this narrow passage along the side of the lot; the fact that there is only 20 or 22 feet left is a great damage to the property. Assuming that the roadway is sufficiently wide for the purpose of business there is no other very serious damage besides that, in my estimation—that is, that street is practically cut off from this lot. Of course teams may be able to run up and down there closely; cannot have any sidewalk there. The front of the lot is absolutely ruined, in my estimation, as a street front; I refer to the 18th street front. A street front may or may not be of great value to a coal yard. It would depend upon circumstances whether the street front to a piece of property was on a level or an incline. Sometimes it would be a disadvantage; at other times it would not be much of a disadvantage. My estimate of the damage is based upon looking at it as a piece of valuable property and weighing the different damages which I think have accrued to it. I think the grade having been increased is one
70 point. I don't know that as a matter of fact it has been. I know it simply from the testimony. I don't know that the grade of Lumber street has been raised; and among the objections to the raising of the grade is the difficulty of hauling up and down. The space is narrow between the lot and the railroad track. My testimony is based upon these assumptions: first, that there has been a material change in the grade of 18th street; and, second, that Lumber street has been raised beyond the established grade. Now, in addition to that, the principal thing of all is the damage to the street front in consequence of narrowing that street from an ordinary street to one of twenty feet. I conside- that the great damage to the lot because it ruins the frontage of 260 odd feet on 18th street.

18th street is a long thoroughfare and is traveled a great deal; it is simply reduced to a front upon a moderate alley. The people are not liable to go down that alley-way to do business, except they are specially compelled to go that way to get upon that property; it is not good for anything now. That property is a good place
71 for business like coal and lumber business, requiring dockage. I do not know that there is much retail business on that street, and taking the people that have owned this property for the last 14 years have put it to the most profitable use that it could be put.

Q. Now, I will ask you whether a street frontage on a grade is any great advantage to property used as a coal yard or lumber yard or other heavy business requiring dockage?

A. It is not so much used as it would be if it was being used for other business, of course.

Redirect examination:

The question of the destruction of the sidewalk is one of my elements of damage.

72 GEORGE M. HIGGINSON, a witness called on behalf of the plaintiff, testified as follows:

In the real estate business and have been for 20 years. Reasonably familiar with the property in question before the viaduct was built, and have examined it recently with a view of estimating the value of the property and the damage to it by the construction of improvement. Just preceding the building of the viaduct the property was worth $3.50 a foot, river front. I should judge it was seriously damaged by the construction of the improvement.

Q. How much was it damaged, in your judgment?

Objected to; objection overruled; exception on behalf of defendant.

A. I should say 40 per cent. My estimate of the value is the value of the property without the improvement, but I count the dock as a part of the value of the lot itself.

Cross-examination:

I have not sold any property in the neighborhood of the property in question in the last 5 years, but I have had considerable
73 for sale. I never had any for sale on 18th street nor on any street near there where there is a bridge across the river. I have no property similar to the property in question for sale in my hands between 12th street and 22nd within the last 5 years. I cannot call to mind any sale of property near this property. I know the property on the east side of the river. As between the east and west sides of the river I should, I think, prefer the west side, because you have the trade of the west side nearer to you. The property on 18th street from the river to canal has been generally used for lumber and coal yards. At one time it was all retail business in lumber and coal there, and I should say there was considerable available

retail business there still in lumber and coal. Since 1878 the property has been used for the storage of quantities and the sale of coal and lumber. The bulk of the business, however, has been wholesale. That would be also true before the viaduct was built—the largest portion of the business was wholesale.

74 I suppose there were two or three tracks between canal street and the approach to the 18th-street bridge before the construction of the improvement. I have been over there more or less. 18th street was used a good deal, but there was always some risk in crossing on account of the railroad track.

I doubt whether the travel on 18th street has been materially altered since the construction of the viaduct, except such as you would naturally expect from the increase of the population of the city. The property in question was depreciated 40 per cent. between 1870 and the completion of the viaduct.

Q. Then you have not estimated in your estimate anything in relation to the raising of the bridge, have you?

A. I took into account the whole damage—both the raising of the bridge and the construction of the viaduct; both of them; the whole damage. Just as the thing stands now the 40 per cent. is what I consider my general judgment in regard to the value of property and the damage to it. It was worth $350 a foot in 1878. I cannot tell you what it was worth in May, 1879, but I can give an estimate of my opinion. I don't believe the property
74½ would have sold in May, 1879, immediately after the viaduct was constructed, for over $200 a foot. The property was worth about $220 a foot immediately before the bridge was raised, and it was worth $200 a foot immediately after that was done. The $20 per foot depreciation is simply because the facilities there for doing business are not as great. I do not know of a sale or a rental that I could compare that with. The way I arrive at my market value is the way we arrive at anything in which we are constantly dealing and have continual cognizance of. I have not had any dealings in property similar to the property in question, but it is part of my business to ascertain and keep the run of property and what it is worth—keep myself posted—but I cannot tell you of a single sale of property by which I can compare this property; that does not sound like guess work to me.

75 C. H. GAUBERT, a witness called and sworn in behalf of the plaintiff, testified as follows:

Been in the real estate business since 1876; acquainted with the property in question, and examined it lately for the purpose of seeing the benefits or damage to the property by the building of the viaduct. I formed in my mind an estimate of the value of the property in 1878 and 1879 and of the damage. The property was worth $47,575 at the time. I considered it greatly damaged by the building of the viaduct. It was damaged from 40 to 55 per cent. That estimate is just the estimate of the ground, I take the river front and include the dock, but not the coal fixtures. I separated

the difference in damage arising from the building of the viaduct first and the raising of the bridge and the approaches afterwards. Before the bridge was raised it was damaged 40 per cent. and after raising the bridge and increasing the grade I considered the damage not less than 10 per cent.

Cross-examination:

76 The elements which enter into my estimate are the reduction in the size of the street and the raising of the grade and making it more difficult and costing more to handle the property; making it cost more for transportation is a damage; making the grade steeper. I think the grade is from 3 to 6 feet steeper than it was when the viaduct was constructed. I made an estimate one time that the grade was one foot in 17 now and 1 in 27 to 30 before. I al'ow 10 per cent. for that extra raise. I take the whole raise from the natural grade, the original grade up to the present time, and include it in 10 per cent, and before that not less than 40. I don't think the property would sell to-day for within 40. 50, and maybe 60 per cent. than it would if the viaduct was not there and we had the whole street. I do not believe it would sell for over from $20,000 to $22,000 to-day. I was running the Gardner House from September, 1874, to the first part of 1878, but in the meantime I was dealing outside in real estate. I have not dealt in property in the vicinity of the property in question. I do not base my judgment on what I handle there. I look at the market reports and
77 base my judgment on that. I do not remember any particular sale of property on which I base my judgment. I was a witness in the Culbertson-Blair suit. One effect of the injury to the property is the extra cost for handling any goods obliged to go up that driveway. Another damage is the reduction in the size of the street. I should say that the reduction in the size of the street made a large portion of damage. The raising of the grade also damages it.

Even though it were true the grade of the approach from Lumber street to the bridge had not been raised I should still — that the injury to the property by the raising of the grade was 10 per cent. Supposing the grade had been raised from one in 30 up to one in 17 I should still say the injury was about the same. I don't know that the approach from Lumber street to the bridge is any steeper to-day than it was when the viaduct was built. I took the word of some gentlemen that did figure it that it was 1 in 17 at the present time and before it was 1 in 27 or 30. I suppose the approach to
78 the 18th-street bridge before the building of the viaduct was somewhere from 55 to 63 feet. I don't know that it was the full width of the street. I have not measured it now, but suppose it is from 17 to 20 feet. I don't know how wide the viaduct is.

BRYAN PHILPOT, sworn on behalf of the plaintiffs, testified as follows:

Am in the real estate business in the city of Chicago, and have been for 17 years; am familiar with the property in question. I

have examined it recently for the purpose of estimating what, if any, damage was done to it by reason of the construction of the viaduct. I think the lot was worth immediately preceding the building of the viaduct at least $48,000, and I think it was damaged not less than 40 per cent. by the construction of the viaduct and ten per cent. by the raising of the bridge. As you come out of this property to go up the approach there is quite a grade, and you have to go round on a curve to get to the approach.
79 My business has been generally real estate business in all its departments.

Cross-examination:

I have not any property in this region for sale now. I have had various pieces of property and made sale in that neighborhood. I have sold property on 22nd street, about half a mile south of this property. I don't recollect of any sale on 18th street near this property or any property near this property that I can compare with the property in question. I think the building of the viaduct has a tendency to increase the travel on 18th street; that is my observation. As a rule increased travel on a street benefits the property fronting on that street, and it makes it more saleable. I don't recollect the width of the approach to 18th-street bridge before the viaduct was built. I should think it was not more than 15 or 20 feet now. I don't know the width of the viaduct.

The grade of the approach is very much steeper now than it was before the viaduct was built. I don't know what the differ-
80 ence is. Prior to the construction of the viaduct Lumber street was on a grade with the property along there. It was a muddy street at — time.

There were two or three tracks west of Lumber street prior to the construction of the viaduct. I may be mistaken as to the number. Before the viaduct was built I know I could have sold that property for forty or fifty thousand dollars, and I don't believe I could get half of that to-day for it. I know that, because I had other property for sale along in that neighborhood, and I know of sales—I could not tell you of the sales; don't know of them, but I have kept myself posted as to the value of property along the river, and I have given you my judgment of the value of the property in question, but I cannot give a single instance of a sale with which to compare this.

HUGH P. MORAN, a witness sworn for the plaintiffs, testified as follows:

Clerk for Robert Law; in charge of his 18th-street yards, and have been at that yard for the last 12 years; superintend the
81 delivery of coal and transact the business generally in the absence of Mr. Law. Before the construction of the viaduct and the raising of the bridge the approach in front of Mr. Law's lot commenced on a level with Lumber street. Lumber street is now raised, and it commences on a level with it.

Q. What is the effect, so far as water is concerned, of these changes in 18th street?

Objected to; objection overruled; exception by the defendant.

A. The running snow that falls from the top of the viaduct proper, at Lumber street, goes with the incline to the bridge and turns there and comes down this narrow approach and runs under our office and under our scale-. In freezing weather we have to stop every morning and dig out the ice, delaying our team half an hour and sometimes more. Going up the approach of the bridge we cannot load as heavy as we would like to and as heavy as we should load, and, when we do that, in some cases we have to take and hitch on other teams or take all of our men out of the yard and shove
82 up. The filling in of Lumber street was at the time the bridge was raised. In dry weather, with small loads, we cannot go right up from the scales, but with large loads we have got to back clear off the scales and go out a private drive we had to build for our own accommodation. When there is a big snow storm teams cannot pass on the incline. There was a rise of 3 feet 3 inches when the bridge was raised. When they went to fill in in front of our office on Lumber street they put up a lot of caps, such as they have on the top of docks—timbers—and filled inside of that and planked over even with it, leaving it at that time without any piers or anything on the side.

Q. So that coming down the approach you go right off that embankment?

Objected to; objection overruled; exception by the defendant.

A. Yes; liable to run right off. You cannot cross Lumber street on 18th except upon the viaduct.

Cross-examination:

83 The bridge was not raised at the time the viaduct was built, and the grade up the approach was approximately the same. The approach began at Lumber street and began at about the same place before the viaduct was built. The bridge was not raised and there was but little, small, difference in the approach. I cannot say that there was any particular difference in getting up to the bridge after the viaduct was built than there was before, and all the trouble I speak about in getting up with teams was after the bridge was raised. I don't know what the established grade of Lumber street is. The grade of Lumber street in front of our premises is higher now. Lumber street was considerably used before the viaduct was built. Before the viaduct was built there was about 10 tracks on 18th street. I know they put in a couple of tracks afterwards. The Fort Wayne and the Chicago & Alton railroads run on those tracks, and there is a switch yard there, and all the roads that have
84 business with them use that yard. There was considerable crossing at 18th street. I know of accidents at 18th street. Now it is possible for people on Lumber street to go up this approach

that is there and cross over those tracks by going over the viaduct and in that way avoid delay and danger of trains. Stewart avenue was the railroad thoroughfare, and south of our property the tracks crossed Lumber street; that has been principally a place for transferring grain, and the tracks are right alongside of Lumber street and the teams load there.

Plaintiff rests.

And whereupon the defendant, to maintain the issue on its behalf, introduced the following:

O. H. CHENEY, a witness sworn on behalf of defendant, testified as follows:

Civil engineer and surveyor; superintendent of the sewer department of the city of Chicago; in 1878 and 1879 was the
85 assistant engineer in the street department; had charge of the construction of the viaduct in question; the inclination of the rise from Lumber street up to the bridge was just the same after as it was before the viaduct was commenced.

Map showing the cross-section of the timber-work of the approaches going up to the 18th-street draw-bridges and also cross-section of the wooden superstructure.

(Here follows diagram marked p. 86.)

87 I made the original drawings from my own actual survey. I have compared this map with the original drawings, and it is correct. The approach going up from Lumber street is 22 feet over all, 5 feet sidewalk, and 17 feet roadway. The viaduct is 37 feet over all, 6 and ½ feet sidewalks each side, and a roadway 24 feet.

The incline from the bridge down to the level was just the same after the viaduct was built as it was before. I think the grade was a trifle less than one foot in 20.

The tracing now shown me shows the location of the tracks as they existed at the time this survey was made, in 1878, before the construction of the viaduct. It is a correct tracing of the original map that I made at that time, which was correct. There were 11 tracks there at that time. The tracks were on Stewart avenue. There was a great deal of switching there. This plan shows the number of tracks immediately before the construction of the viaduct was commenced, in 1878.

88 Cross-examination:

The approach was not raised at the time the viaduct was built. It was substantially the same elevation. I have been across there within the last 6 months. This work was completed in 1879 and the following year. I think the work was in course of construction about ten months. I know nothing about the raising of the bridge afterwards.

WILLIAM B. NORTHWAY, a witness sworn on behalf of the defendant, testified as follows:

Civil engineer, and have been 29 and ½ years. In the employ of the city about three and a half years, and was at the time that the bridge at 18th street was raised.

I made a survey of the ground and the viaduct and the approach previous to the plan being settled on for raising the bridge. I made a survey of the condition of things on the 13th of the present month.

The map now shown me shows a profile of the viaduct and approach as it was in 1880, before the bridge was raised, and the red line shows the present situation of it. It also shows the pro-
89 file of the ground at the crossing of 18th and Lumber streets, and also the approach to the viaduct proper from the bridge, as well as the approach from Lumber street to the bridge.

City datum is an imaginery line taken from the low water of 1849 in Lake Michigan, and is the level from which all city levels are taken, so that the figures here show the height above datum at the various points.

The city ordinance makes the established grade of Lumber street at 18th street 11 feet and ½ above city datum. The present grade is 11.35 above datum.

In coming from the west side across the viaduct they would turn on the viaduct and go down its incline. It is about 45 feet from the grade to the point to where the incline begins, down at Lumber street. In coming from or going to the south side there is no turn to be made. There is free access, and coming from the west side over 18th street they have about 210 feet before they turn to go down onto Lumber street. 18th street runs east and west, and the general direction of Lumber street is north and south.

At the average stage of water there is about 18 feet between
90 the river and the bottom cord of the bridge, and the floor of the viaduct is even with the floor of the bridge. Then the approach to the viaduct runs along level about 130 or 140 feet and then goes up on the viaduct proper on a slight rise. Law's property is right along the side of it. You can stand on the end of the viaduct and look down into his property. The viaduct runs west of Law's property, across the track. Mr. Law can get out of his lot by coming out either on Lumber street and passing up this approach to the head of it and go- right out on the south side or by turning west — go- over on the west side. From the level of Lumber street at the northwest corner of Law's property there is an approach leading upon the south side of 18th street to the bridge, and about 45 feet from the bridge it comes up to the level.

There was always an approach, as I understand, but I don't know anything about it prior to November, 1880. The present grade of the Lumber-street approach at the intersection of the corner of the lot, where the office is, is about 12 feet above datum.

There is no practical difference in the inclination of the
91 grade since the bridge was raised. The grade of Lumber street at 18th was raised about 3 feet. The old actual grade

was 8 feet above datum at the west side of the street. The present grade is 11.35 feet. The grade given in the ordinance is 11 feet and ½.

Hardly any two grades of approaches to bridges in the city are alike. The slope of the approach from Lumber street to the bridge is about 1 foot in every 19 now, and it was the same before the bridge was built. Those figures are correct on the map; no variation more than half to three quarters of an inch in any of them. Two men will hardly ever hold their rod in the same place. With the exception of those variations, the figures are correct.

The following map offered in evidence:

(Here follows diagram marked p. 92.)

93 Cross-examination:

I think the office that is now on Law's lot was where it is in 1880. I don't know prior to that time. I can give you the difference between the scales and the street, and, I think, probably, the scales are higher than the lot. It is about 4 and ½ feet up to the scales onto the street. The scales are about 35 or 30 feet from the corner. There must have been an increase in the elevation somewhere when the bridge was raised which raised the whole approach; it was done by building an embankment or trestle or something on Lumber street raising Lumber street itself under the 18th-street viaduct up to correspond with the approach as it was raised. On the west side of Lumber street, I think, there is some timber docking about even with the edge of the second pier. I don't know how wide Lumber street is. After you go down this incline and get on Lumber street you still have to go down a further grade to get on this property.

94 It is not steep by any means on Lumber street; it is shown on this map. There is where the change of grade is, 3 and ⅓ feet, which is just what the bridge was raised. I can't tell how far Mr. Law's office is down below the grade of Lumber street. I did not make the sketch before me. I made the figures and verified it on the profile. There is a sidewalk on the south side of the viaduct, part of the approach to the viaduct, between that and the incline going down Lumber street, as well as a sidewalk on the north side. People coming from the east to the west and going down the incline to Mr. Law's property would be obliged to come back again and turn around and go west. Lumber street appears to be still open, and they might go out Lumber street if they wished. You cannot go from Mr. Law's office west on 18th street without going up the incline towards the bridge. You have about 25 feet to make the turn in; from 25 to 35 from where you would leave the line of Mr. Law's lot before you need to turn your horses. As you come out of the property you have to go up an incline to get on Lumber street. When you get on Lumber street you have the whole

95 width of Lumber street to make the turn in. You have the width out to that dotting, anyway.

Redirect examination:

Lumber street is not stopped up at that point. In order to get to the west side without going across on the viaduct you will have to cross the tracks.

Original ordinance passed May 27th, 1867, which contains this section:

"All grades between the points mentioned in said tables shall be straight lines from one fixed point to the nearest fixed point."

The two nearest fixed points shown in this table are Grove street, 12 feet; Wentworth avenue, 12.22; that would make the grade at the intersection of Stewart avenue and 18th street more than 12 feet.

Stewart avenue runs right into Lumber street; 11.50 I give as the established grade of Lumber street.

It is admitted that the grades have been changed and made from 11.50 to 12.

By agreement ordinance considered in evidence.

Teams coming out from the property in question, the curve that has to be made depends upon where they come out. Before the viaduct was made the road from Lumber street up to the bridge
96 was the entire width of the street, or substantially so, and you had that to turn in. The present roadway is 17 feet wide, and a team coming up from the lot so as to go over along the bridge or up onto the viaduct must make a shorter curve than they could have if they had the whole roadway.

MARTIN VAN ALLEN, a witness sworn on behalf of defendant, testified as follows:

Civil engineer, and in the real estate business; been in the real estate business 30 years; know the property in question, and have been acquainted with it about 25 years. I have dealt considerably in that vicinity, and was almost daily there during war times, tending to shipments on the Alton railroad. I remember there was considerable interruption in 1878 and 1879, during the construction of the viaduct, so I did not pass so frequently. I had to do with the negotiation of property on the river just south of 22nd street, a large triangular piece of ground with a packing-house on it. I re-
97 member negotiating that sale in the winter of 1879, about three-eight-s of a mile from the property in question. I have heard people say what property was bought at right exactly across the river from this; I should think about 1880 or 1881.

I have an opinion as to the value of this property in 1878 and 1879, based on the knowledge of these sales that have taken place that I know of and what I have heard from gentlemen who were interested in the sales. That particular property has not varied very much from 1871 down to the present time. The change in the prices have been comparatively little, relatively speaking, to the general change in the valuation of property throughout the city otherwise located. In my opinion, that property in 1878 and 1879,

before the viaduct was constructed, would sell for from about 75 cents to a dollar a square foot. I have not ascertained how many square feet there are in the piece; that would make it from $240 to $250 per front foot, average frontage—that is, if it is 75 feet on Lumber and 167 on the river that would be 121 feet average;
98 that would be the valuation in 1879, which I understood you to ask me. There was a little advance there. It might drop down the price from those estimates five or ten dollars. In my opinion, the construction of the viaduct was an advantage to the property in question. I remember the old floating bridge there, and I remember the different bridges that have been there all along.

Q. It is in evidence here that the approach and the bridge were raised directly up some 3 feet and 3 inches. What, in your opinion, has been the effect on the market value of that property by the raising of that approach and the bridge?

A. Nothing at all; nothing unfavorable; if anything, it is favorable. I think I should rather have the property with the grade 3 feet additional — what it was than to have it 3 feet lower than it is now, for the reason that this — an ample room to utilize the dock there for dockage, and at the same time gives a floor entrance from the viaduct in onto the floor of a building to be constructed on a level with the present viaduct—makes dock property at an elevation better to be utilized. Lumber street, being raised above the
99 natural surface of the ground a little, makes it a little more steep, running from this property onto Lumber street, but when you have got onto Lumber street there is no more difficulty in getting on to 18th street than there was before. I have been on the property within six weeks.

Before the construction of the viaduct there was tracks on Grove street, on the east side of the river, and tracks on Stewart avenue, on the west side, which rendered it extremely hazardous to attempt to drive across 18th street. There was a switching yard there, where trains were made up to and from the elevator. That is on the west side. There were six or eight or ten tracks there.

Taking it altogether, I think that there is more travel now, in proportion to the population, in that vicinity than there was before.

There has been no change whatever to the access to the property in question by the construction of the viaduct or the raising of the approach. The change has been all in consequence of raising
100 Lumber street, and that has not been changed a particle except in the height*h* at which you could get into a building if a building was constructed there.

It has changed the height*h* of the main floor at that building.

Taking it as it is at the present used and has been used for 40 years, there has been no change in it at all. It has rendered the access to the lot more difficult. The lot has to be raised to the extent Lumber street has been raised.

This property has been used for a lumber yard; it has never been used for any retail business and is not valuable for retail business.

Cross-examination:

I know that there has been no retail business there. I don't know but what if I go to Mr. Law's office down-town and order a ton of coal he will send it from that yard, but what I mean is, I don't know of any demand there for retail business in the usual acceptation of the term.

If Mr. Robert Law swears that by the building of this viaduct the retail business conducted on this very piece of property
101 was reduced so that it was not 20 per cent. of what it was before it would not affect my idea of its value, because I should conclude, from what I see going on there all the time, that if the retail business has been reduced the wholesale must have been increased, and the wholesale has the greater proportion of profit in it.

Mr. Law can get his coal out of there either by rail or by team after he has got to Lumber street just as cheaply as he ever could. Mr. Law can ship by every road that goes out of Chicago. I don't know that there is a track that runs into his property, but there are tracks right at the door. I don't remember that I have ever seen coal loaded there in that way, but I have seen a great deal of lumber shipped. That was about 20 years ago, when I was there every day.

18th street is more traveled now than it used to be. There is an approach on the south side of 18th street, running to the bridge, next to this property. There is a sidewalk on the south side of this property, and also on the north side. There is no sidewalk
102 from the west side past this property except upon the viaduct.

I should say that the approach next this property is from 12 to 15 feet. Alleys are from 12 to 15 and 16 feet. There is about room for two teams to pass one another. Property on an alley is not worth as much as property on a full street. Some property on narrow streets is worth more than property on broader streets. My opinion at the time was and now is that State street was not benefited to the extent of its cost. It was sixty feet wide and was made 100. I should think it was 19 or 20 feet from the level of Law's coal yard up to the viaduct. If this property were used for a warehouse you have 20 or 25 feet, I should judge, at the end of the bridge before you strike this incline, and that is room enough to gain access to the warehouse. Then, when you go further down, you could construct an approach right from the present viaduct, and passing over the incline right into the front of the property—the Lumber street front. That would not be a difficult thing to do, and you have got the whole width of the street, from the sidewalk line clear over
103 to the front of the property. I think there is a little bridge-house up at the bridge with a warehouse constructed this way. You enter from the street at its full width. The street is 66 feet right at the bridge. The 18th street front of this property is 269 feet, abutting against 18th street. Now, what I say is that you can construct a building in there with the floor on a level with the floor of the viaduct, which is practically level, and you could carry it across the approach to the bridge. Now, while it may be a damage to property to have to pass over that approach and put a building

there in that way, yet that damage is more than made up by the benefit of having an extra main floor. You can go in right off from the viaduct and you can go in right off from Lumber street; you have either entrance. You have the present original street front on Lumber street just as you always had it, and when a building is erected in this way on this property you have got another
104 main floor with its access from 18th street. You have got a double building, a double lot, a two-store lot, two main floors to it. I have known of buildings built in this way. I built one at the corner of West Water and Randolph street just before the fire; had railway access in the rear and used it for a marble yard, and had stores on the main floor—10, 12, 14, and 16 Randolph street. There was no approach there between that property and the viaduct. The whole of West Water street is occupied by tracks of the Pittsburgh and Ft. Wayne and the Milwaukee and St. Paul railroad. The viaduct came down on the west side of the building—down the alley—and gained an access in that way. We had our access there from that side instead of having it all from the west side. There was a viaduct over West Water street, on West Randolph. There was no incline down in front of this lot.

Q. Suppose it to be a fact that the lot immediately in front of this lot 1, to wit, lot 2, $40,000 was refused for it immediately before the building of the viaduct, and it was sold for $28,000 immedi-
105 ately after on that account, would that affect your judgment as to the value of it or the damage to this piece of property?

Objected to; objection overruled; exception by the defendant.

A. Not at all; not a particle, sir; a great many of those trades are made in that way. A man gets a foolish notion in his head, and that might have been one of those cases where a man made a very foolish mistake at that time in selling his property when he did sell it. Assuming that lot 2 before this improvement rented for $3,000 and after the improvement for $1,000, I should have to know all the circumstances surrounding the lease before answering as to whether or not it would affect my judgment on the value I have given. I should say not, for this reason, the construction of a viaduct was an experimental condition of affairs and the owner could not tell really what amount of rent he was going to get from his property and the man leasing it would say: "I don't know what kind of effect
106 it is going to have on my trade." The man was not willing to take his chances on it, but lets the property take the chances. I have never sworn before in this character of cases for the city of Chicago. I testified in the Culbertson and Blair case opposite to this property about a year ago and was down there then. I went there to form a judgment of all the property affected by the construction of the viaduct, to give an intel-igent opinion to the jury as to its effect on the Culbertson and Blair property. I have not made an examination since. I have testified in other cases in regard to damages caused the property by the construction of railroads and have been called as often by the property owners as by

the railroads. In 30 years, I think, I have testified three or fore hundred times.

HERMANN BENZE, a witness sworn for defendant, testified as follows:

Reside in the city of Chicago, and have been in the real estate business for 15 years; have known the property in question for more than 20 years and knew the market value of it in 1878
107 and 1879 and from that time down. I have had considerable dealings in that vicinity, and my attention was particularly directed to property in that vicinity on the river in the condemnation cases of the Chicago and Western Indiana Railroad Company from 1878 to the present time. I know of the sale of the corner of 19th and Grove street, on the river, in 1878 or 1879, and a sale on the river and 22nd street made about two years ago; also a piece a little west of Halsted street, about half a mile west of this property. When I had a sale of property on the west side of the river a little north of 18th street, a part of the old ferry lumber yard, I did not sell it, because they asked too much for it. By adding the river front and the Lumber street front together and dividing it by 2 you get the average frontage, and I figure that at $275 a front foot—that was in 1878 and 1879, before the building of the viaduct—$275 a foot for 120 feet. The construction of the viaduct has been beneficial to the property and has increased the market value of
108 the same. The property is more accessible now than it was before the viaduct was built. It was almost impossible to reach it from the west, there being a perfect network of tracks in Stewart avenue, and it being all a man's life was worth to cross there without a viaduct. When a train of cars came there there was a jam of teams, and they tried to get across and another train was liable to come and there was quite a number of accidents. The viaduct has done away with that. Narrowing a roadway or street will naturally damage the property abutting upon it, but if by so doing you increase the facilities for reaching the property, as is the case here, it is no damage. This property has easy access now; more so than it was before. I do not believe raising the grade of Lumber street 3 feet and 3 inches has effected the value of the property in question. I have seen heavy teams come out of that yard and go up that incline without any trouble at all; about as heavy load as they can. There is plenty of space there to swing around. I have seen teams come up. The bridge was
109 swung and I was compelled to waite and watch them come up. That raise would not affect the market value of the lot. I examined the property several months ago, and after I heard the testimony yesterday as to the 50 per cent. damage I thought I could not be mistaken in my estimate of damage, and I went down there again this morning.

Cross-examination:

Heretofore in crossing over onto the west side from this lot you had to cross all the railroad tracks there and quite often were delayed by the trains. Now you can go right upon the viaduct and not be delayed at all. There is a space 20 or 30 or 40 feet between the bridge and this approach. During the summer season, when the bridge is swung, teams fill that space so that there is a proportion at least of obstruction in that respect, but the bridge is not open as often as trains passing, which are going all the time. The facilities of access to this property have been improved. On the opposite side of the street, at the property, they have not got this incline
110 that this lot has, but they consider the property benefited, as they told me themselves this property is more easy of access than it was before. I suppose the photograph of the ferry property which you show me to be correct. There is a great deal of difference between the Law property and the ferry property. The Law property has an incline, and the ferry property has not, and still I consider the ferry property benefited, because you can go to the property without being delayed by railroad trains, which is the greatest objection to the property. You can go from the west side across on the viaduct and then go down on the incline. From the south side you can go right down. The reason this viaduct was built was to avoid railroad tracks. If you don't go out over the viaduct, of course, you have the obstruction you had before. This improvement was decidedly a benefit to the property.

Q. Now, is it a benefit to this piece of property, having 260 feet front on the street, to have an incline running from, say, 20 feet down to 3 or 4 feet in front of it 16 feet wide?

111 *Q.* It is not; but if you take both things together it is a benefit. Passing from the west you go up on the viaduct and not pass the property. You can go out from this property west on 18th street without going up the approach. That is the very thing the viaduct was built for, to save life in crossing with teams. I do not consider it an improvement to a piece of property to be on an 18-foot alley instead of on a full street, and consider the width of a street affects the value of property very decidedly. In the last ten years I have been examined hundreds of times and called by private individuals, the city, and railroads. I have been appointed by the court commissioner for the city of Chicago on assessments a good many times. I have seen this incline when it was slippery, but do not recall that I saw teams go up at that time. I can imagine it is difficult to get up there when there is ice on it, of course.

Q. Don't you know that they have to double teams to get up?

112 A. Well, if they do that they must have double teams to cross any bridge in the city, to get up the incline. I have not seen them do it, but I suppose they do do it.

Q. Suppose, Mr. Benze, that the effect of this improvement was to throw a large quantity of water on this lot, would that have any effect, in your judgment, upon the question of its being damaged?

Objected to; objection overruled; exception by the defendant.

A. Of course, whenever it rains or thaws water will go down there, but I don't suppose it does any particular damage to the coal business at all. I don't think it would affect the value of the property at all. Assuming that the lot immediately adjoining this on the south, immediately before the building of the viaduct, $40,000 was offered and refused for it, and immediately after the construction of the viaduct it was sold for $28,000, I would not consider it in forming my estimate of the value of the lot unless I was acquainted with all the circumstances under which the sale was made. If it were a *bona fide* transaction, the party trying to get all he could for his property, I
113 don't know but what it might, because actual sales are a criterion of value of property. Assuming that lot 2 rented, before the viaduct was constructed, for $3,000 a year, and after its construction for $1,000 a year, it would very likely affect my judgment as to the value of the property in question, but I should want to be perfectly acquainted with all the circumstances under which the lease was made before passing on it. I had the ferry property for sale as far back as 1878. I did not succeed in selling it, but the party that had it was required to pay more rent because of the viaduct being built, and it was worth more. I did not sell it, because they asked too much for it, and I told them so. I have considered the raising of the grade of Lumber street. It is a little inconvenient, but don't amount to a great deal; does not affect the market value.

Redirect examination:

In considering the rental value of property and the rent
114 the property brings, the fact that the tenant is also a joint owner of the fee and manages the fee for the other joint owners and make a lease for both sides would make some difference, and one of the circumstances which, as I stated, I would like to know. I have been employed often as a commissioner to make partitions of land and have acted in that capacity for the counsel for the plaintiff in the present suit.

MUNSON D. DEAN, a witness sworn on behalf of the defendant, testified as follows:

In the real estate business in the city of Chicago about 12 years; have negotiated sales of dock property connected with the railroad; have sold the corner of North Clark street and the river, and on the Chicago and Northwestern railroad. It is being used as a warehouse property, situated with a dock in front, a railroad track behind, and a viaduct on one side is available for shipping and warehouse purposes. It has an advantage from the simple fact that there is an entrance from the viaduct without any obstruction from the railroad track. You can
115 also do your shipping from either the river front or the railroad front without having to cross the track. Property so situated is also valuable for wholesale lumber and coal, and I do not think a viaduct could be any detriment. I have known of

several sales of dock property in the last four or five years. I remember one at the corner of 22nd street and the river in 1881 or 1882.

In 1879 the value of the property in question was from $250 to to $275 per average foot. I have examined the property lately. In my mind, the construction of the viaduct would have effected to enhance the value of the property and make it more desirable. I am acquainted with the character of 18th street. There is 10 or 11 railroad tracks on Stewart avenue. My reason for saying the viaduct would be a benefit to the property would be the viaduct protects the travel from these tracks, while before it was constructed it was almost impossible for travel and also very dangerous. As it is now, there is no danger whatever.

116 I do not think the narrowing of the approach on the south side of the street to 22 feet had any effect upon the property. The roadway left affords easy and convenient access to the property. I cannot say that the raising of the grade of Lumber street 3 feet and one-third would have any bad effect upon the property. The only difference would be to raise it to the grade on Lumber street.

Cross-examination:

There is no viaduct on 22nd street. The viaduct in front of the property on North Clark street is very nearly level. There is a slight incline from the viaduct to the bridge. There is no incline running down from the viaduct to North Water street, and buildings can be constructed right up to the viaduct. If the North Clark street property had a 17-foot incline running down from the viaduct to North Water street it would not be as good as if it came up close to the viaduct, but my idea is that if damaged it is more than met

117 by the benefit derived in the manner of getting out. The property is damaged to a certain ex-ent, as I say.

Assuming that before the construction of the viaduct $40,000 was refused for the lot immediately adjoining the lot in question, and after the construction of the viaduct was sold for $28,000, I should have to know all the circumstances connected with the sale before stating whether my judgment, as given, would be affected. My judgment is that the property would sell for a great deal more money to-day on account of the viaduct than it would if it was not there. If the facts were, as I have stated above, it might affect my judgment to a certain extent. Assuming that lot 2 was rented for $3,000 before the viaduct and for $1,000 afterwards, it would not affect my judgment regarding the value of property, for I might consider the property benefited by clearing away the obstruction of the track; still it might to some extent.

Assuming it to be a fact that by reason of the building of the viaduct the lot was flooded it would affect my judgment in regard to the damage, but my idea, as I said before, is that any dam-

118 age arising from the construction of the viaduct is more than overbalanced by having the viaduct there.

D. W. MITCHELL, a witness sworn on behalf of defendant, testified as follows:

In the real estate business for 20 years in Chicago; am agent for some dock property along the south branch and am offering some for sale just south of 22nd street, on the west side of the river. I have had more or less to do with that class of property since I have been in the real estate business. I have known the property in question for 25 years. I recollect when the viaduct was built. I know of sales that were made on the opposite side of the river. I don't know of a sale on the west side.

In my opinion, before the building of the viaduct the property in question was worth $30,000, being $250 a foot for the average frontage. I don't think the property is damaged a particle by the building of the viaduct, because teams which have to be employed to haul in and out there can make a great many more loads a
119 day by going over the viaduct and down the incline than they could by waiting to cross the track. Before the construction of the viaduct it was difficult and dangerous to cross 18th street on account of the trains.

Cross-examination:

There is no viaduct at 22nd street. I have had no property for sale in the vicinity of the property in question and know of no sale in that immediate vicinity. Assuming that lot 2, immediately adjoining the lot in question, — $40,000 was offered and refused for before the construction of the viaduct and it was sold for $28,000 after the construction of the viaduct, it would not change my judgment as to the value of the property and the damage to it. What it will sell for in the market is a material element, as is also what it will rent for. Dock property is called improved property, and where it is rented for a term of years the rental value is a material element in estimating its value. Assuming that lot 2, adjoining the property in question, rented for $3,000 before the construction of the
120 viaduct and for $1,000 after the construction of the viaduct, it would have a tendency to make the great majority of people think it was damaged. The fact that the effect of the improvement was to throw water upon the property in question would be a damage to the extent of what it would cost to run it off into the river. The river front is the principal value of this property. The approach to this property is no damage to it; gives you a better use of the property than you had before. There was considerable depreciation in the value of property between 1870 and 1878, but the value of both years were about the same; between 1878 and 1881 there was a small increase.

Redirect examination:

Where a part owner of property rents it to himself or agrees with his brother owner about what he shall pay for the use of their portion, it would not be a proper criterion of the rental value of the property as a whole.

Recross-examination:

Assuming that the property rented for $3,000 a year before
121 the viaduct was constructed and for one thousand dollars a year after the viaduct was made, the lease being between the same parties, it would not have a material effect in determining the value of property. Some business is carried on in different ways in different years; it might affect it where it was an adjoining lease.

ALBERT L. COE, a witness sworn for defendant, testified as follows:

In the real estate and loan business for 20 years. To some extent I know of the sales of dock property on the South Branch of the Chicago river within the last 5 years. I know the value of lot 1, in question, in 1878, and my knowledge is derived from sales of property and what property was held at in that neighborhood. I know of sales here on the corner of Grove and 18th and 19th street- and Grove, and then take it further north, between Harrison and Polk; then in 1878 and 1879 there were sales between 19th street and 22nd street. From my knowledge acquired from these sales, I would say the value of the lot in question in 1878 and 1879 was $250 a
122 foot, average frontage on the river. I have been on the property and remained some little time, and saw some loads hauled out; noticed the weights, and so forth; one that I saw weighed 7,640 and the other about 7,500 pounds. Those were very large loads, and I saw them drawn out of the yard on wagons. They went up the approach—two horses to each wagon. They pulled out onto Lumber street from the yard, and then, as they came to the rise, they swung to the east side. There appeared to be plenty of room to turn in, and they drove up on the 18th street —; one load went over on the south side, and I do not remember where the other went. 18th street is a traveled street now. Before the construction of the viaduct it was a very dangerous, unpleasant crossing. I should think there was seven or eight tracks there before the construction of the viaduct; now there is about twelve. South of 18th street there were side tracks and north of 18th street there are switch yards and depots, so that there was a good deal of passing
123 there and travel was impeded. There were frequent instances there of unfortunate accidents.

Taking the construction of the viaduct in all its bearing, I do not think its construction has damaged the property. The uses for which that property has been adapted can be very well carried on at the present time as before the viaduct was built, and the access to and from it, especially from the west, is much better; it is not impeded at all; the grade is about the same, going along to 18th street, that it was formerly, going up onto the bridge, so that as heavy loads can apparently be taken up there now as there could be before, and the undisturbed travel to the west is quite a point.

The elements which make the market value of the property in question are the access to the lot from the river, which is very important. It also has access by rail.

Another element is the availability of removing whatever is deposited. I do not consider the property available for retail stores. 18th street in that neighborhood has never been so occupied.

124 To some extent I am familiar with the coal business and know that orders for coal are generally taken at the central office and they communicate with the yard. I think Mr. Law has an office in the Tribune building. The river frontage and the possibility of connecting it with the railroads are the two elements which make up the main value of the property in question. Property back from the river can be bought for a very much smaller sum, but this, where they unload from vessels, is very convenient for a grain warehouse. I considered the narrowing of the roadway in front of the property. I walked down there and made up my mind that the roadway is sufficient for all practic-ble purposes, and I noticed that as you came up onto the level between the bridge and the viaduct that there was space, if it ever should be thought practicable or desirable, to build a warehouse; you could unload from the vessels and then draw it away with wagons; there is room enough for that there.

125 There are similar improvements at various approaches to the bridges throughout the city, where there is an entrance on the approach to the bridge and also an entrance from the railroad or dock below.

Cross-examination:

I don't know that there is a building exactly built in that way, and I don't know of one with an approach running down in front of the lot. I think there is a level of 50 or 60 feet between the bridge and the viaduct. If you cut off the frontage entirely it would make some difference to a piece of property, if you depend on the street to do business. If you leave 49 feet only out of 269 feet front it would be a damage, but that is not the case here, because you have your Lumber-street entrance and the same grade down to Lumber street. You don't necessarily have to enter on that incline. Lumber street is apparently higher than the railroad tracks. There would be no trouble, however, in switching across Lumber street by building to grade and laying a track across. I should prefer property on a good street to that on an alley, other things being equal.

126 I don't know of a sale on Lumber street between 18th street and the river, unless it be the piece purchased by Mr. Law. Most of the sales which I know of are on the opposite side of the river, with railroad tracks running past them. A number of the sales that I spoke of were purchases by a railroad company.

Assuming that before the construction of the viaduct $40,000 was refused for the lot adjoining the lot in question and after the construction of the viaduct it was sold for $28,000, I should think the seller was hasty, if his mind was governed *my* merely the viaduct. The sale would not affect my judgment. The income of a piece of property affects its value somewhat. If the rental value of a piece

of property was reduced one-third and continued that way it would affect my judgment as to the value of the property, but the idea that a man is scared and thinks it is injured would not influence me, if, on the spur of the moment, he had let it go for what he could get.

I should have to know all the circumstances before stating.

127 I have testified fully a hundred times in this class of cases in the last 10 or 12 years, and a good many times have been called by the city of Chicago.

Which was all the evidence offered in said case by either of said parties.

Whereupon the defendant asked the court to hold as propositions of law and to instruct the jury as follows:

I.

That the question to be determined by them is whether there was any depreciation in the market or fair cash value of the property in question caused by prevention of access or inconvenience in obtaining access to the property mentioned in the declaration by reason of the construction of the viaduct or by the raising of the bridge and the approaches thereto.

II.

That if the jury shall find from the evidence that increased facilities have been afforded for access to the property in question by the construction of the structures mentioned in the declaration,

128 then they should consider the effect of such increased facilities in determining whether, on the whole, a damage has been inflicted, and the amount thereof.

III.

That if the jury shall believe from the evidence that the market value of the entire property was depreciated by the construction of the viaduct in the years 1878 or 1879, then they should only find for the plaintiff two-fifths part of the damage so done to the entire property, and that if they shall find from the evidence that the market value of the entire property was depreciated by the raising of said bridge and the approaches thereto in 1881, then they should only find for the plaintiff three-fifths of such damage done to the entire property.

IV.

That no damage should be allowed by the jury on account of the construction of the bridge or the approaches thereto as they existed prior to the time when the viaduct was constructed.

129 V.

That only such damages can be recovered in this action as have been done to the market value of the property by rendering the access to the property difficult or inconvenient, and that all testimony as to the flooding of the premises in question with water from said viaduct, bridge, and approaches must be disregarded by the jury

VI.

That if the jury shall believe from the evidence that the city of Chicago established the grade of Lumber street before Moses Taylor became the owner of the property at a greater elevation than the testimony shows it to have been raised by the city in making the new approach to the bridge, no damage can be recovered from any inconvenience of access to the property from Lumber street caused by the raising thereof.

VII.

That the jury should not take into consideration any effect
130 that may have been produced upon the business of the person in possession of the property by the construction of the viaduct or the raising of the bridge or the approaches thereto.

VIII.

That all evidence concerning any offer for or refusal of a price for the lot adjoining the property in question on the south, known as lot two, made before the viaduct was constructed is excluded from the consideration of the jury.

IX.

That any effect of the construction of the viaduct upon the value of the property in diverting public travel along 18th street to the said viaduct and from the property in question cannot be considered in this case and forms no proper cause for recovery by the plaintiff.

Whereupon the court charged the jury in manner and form following—that is to say:

131 *Charge to the Jury.*

The COURT: Gentlemen of the jury, this is a suit brought to recover damages plaintiff claims to have received or sustained as the owner of three-fifths of lot 1, in block 17, in the canal trustees' subdivision of part of the west half of the southeast quarter of section 21, township 39, range 14, by reason of the construction of what is known as the 18th-street viaduct, which extends from the west end of 18th-street bridge to the street west of Stewart avenue.

The lot in which plaintiff is interested is bounded on the north by 18th street, east by the South Branch of the Chicago river, south by lot 2, in the same block, 14, and west by Lumber street, or at the intersection of Lumber street and Stewart avenue, it being conceded that Lumber street is a diagonal street and runs into Stewart avenue just opposite or nearly opposite the west end of this block. The plaintiff claims title in fee of two-fifths of this lot, dated May 2nd, 1870, and by deed of one-fifth, dated January 4th, 1881, and no question seems to be raised as to the plaintiff's title.

The important and perhaps only question in the case is
132 whether the plaintiff has sustained any damages and the amount of such damage, if any have been sustained. It is conceded that the plaintiff has never actually occupied the premises in question, but that since his title was acquired in 1870 the premises have been occupied by a tenant, who has paid rent therefor and carried on the business thereon, so that the plaintiff's business as a business conducted on the premises has been in no way disturbed or broken up by the erection of this viaduct. The question, then, is, Has the value of this lot been diminished by reason of the construction of this work? The plaintiff claims two elements or causes of damage:

First. The construction of this viaduct in 1878–'79 under an ordinance passed by the common council of the city.

Second. The raising of the bridge and viaduct in 1881 by ordinance passed in May, 1881.

At the time the viaduct was constructed, in 1878 and 1879, the plaintiff owned only two-fifths of the lot in question and is entitled only to two-fifths of the damage which the construction of the viaduct proper caused the property.

133 At the time the bridge and viaduct were raised, in 1881, the plaintiff owned three-fifths and is entitled to three-fifths of the damage caused by the raising of the bridge.

It is admitted that soon after or about the time the plaintiff bought the two-fifths interest in this lot, in 1870, the bridge at 18th street, crossing the South Branch of the Chicago river, was raised to nearly, if not quite, the elevation at which it stood immediately before it was raised in 1881. In other words, the bridge was elevated soon after or just before plaintiff bought his two-fifths interest, in 1870, to such height that tugs could pass under it, and an approach was constructed from the west end of the bridge so as to come down to the level of Lumber street at or about the point where 18th street and Lumber street intersect.

This approach or slope remained till the viaduct was constructed, and no damages are claimed for the construction of this old approach to the west end of the bridge at the time the bridge
134 was raised, in 1870, or near that time, but in 1878 or 1879 a viaduct was built which spans or passes over Lumber street and Stewart avenue and from there slopes down so as to make a grade or approach from Canal street.

In other words, the travel which passed over 18th-street bridge and going west beyond Lumber street or Stewart avenue passed over

these streets, but an approach was also made or left by which teams and foot passengers could pass down alongside the viaduct from the west end of the bridge or to Lumber street and Stewart avenue.

This approach or slope down from the end of the bridge would seem from the proof to occupy about one-third the width of 18th street, and the testimony of Mr. Cheney, one of the city engineers, tends to show that it consists of a roadway for teams 17 feet wide and a sidewalk five feet wide, and that the street is 66 feet wide, so that 22 feet is occupied by this approach, as it is called, or slope down to Lumber street from the end of the bridge, and 44 feet of the street is occupied by the viaduct. That would seem to be from the proof the fare conclusion.

135 The plaintiff's proof tends to show that the lot in '78 and '79, before the viaduct was built, was worth from $400 per foot front, which is the estimate put upon it by Mr. Law, to $350 per footf ront, measured by the river front. The testimony in this behalf is, 1st, the testimony of Mr. Law that the improvements on the property, not including the dock, but the sheds, scales, and office and derrick and other fixtures, are worth $7,000; that the land is worth $400 per foot, river front. If he means to measure the entire 167 feet river front, that would bring the value of the property by his estimate $66,800. If he me-nt, as the other witnesses seem to have done, to average the river front and the street front together and make an average front of 120 feet, then his valuation would amount to $48,000, and Mr. Law testifies that the damage to the property by reason of the construction of this viaduct and raising the bridge was from 60 to 65 per cent.—that is, that its value was reduced by the construction of the viaduct 50 per cent. and from 10 to 15 per

136 cent. by the raising of the bridge and viaduct in 1881. This is the testimony of Mr. Law.

Mr. Baird, the next witness called, estimates the value of the property before the viaduct was constructed at $46,000 and puts the gross damage at fifty per cent. of the value.

Mr. Higginson puts the value of the property before the viaduct was constructed at $350 per foot front and puts the damage by the construction of the viaduct at forty per cent. and the subsequent raising of the bridge and viaduct at ten per cent. more. In other words, he sums it up that the value of the property, after the viaduct was constructed, in 1881, was $220 per foot, and after the bridge was raised, in 1881, it was not worth over $200 per foot.

Mr. Gaubert, another witness called by the plaintiff, puts the value of the property of $47,575 and a damage of forty per cent. by the construction of the viaduct and ten per cent. or 10 to 15 per cent. by the subsequent raising of the bridge.

Mr. Philpot agrees substantially in his valuation of that property and the extent of the damage with Mr. Gaubert.

137 On the part of the defendants, the witnesses as to the damage and value were, first, Mr. Van Allen, who values the property at $240 per front foot on the average river front, making a total value of $28,000, as I figure it; says that he considers there is no actual damage to the property sustained by the construction of

the viaduct or the raising of the bridge; that although there may be some inconveniences that will follow, yet it is not an appreciable money damage, which can be said to depreciate the value of the property; that its selling value, its value for utilization for business purposes, is the same now as it was before the construction of this work. Mr. Benze puts the valuation at $275 per foot, average river front of 120 feet, and makes the damage substantially nothing. Mr. Mitchell value- the property at $30,000 gross value, being $250 per square foot for 120 feet front, and deems that there has been no practical depreciation of value or diminition of value; its selling value in the market is as great now as it was at that time, and the same is the testimony of Mr. Coe. The plaintiff's testimony
138 tends to show, without dispute, as I have already said, that the improvements, not including the dock, were worth $7,000, and that they have been diminished in damage proportionately with the rest of the property.

The testimony on the part of the defendants upon the question of damages is, in substance, that, taking the advantages and disadvantages which accrue to the property from the construction of this viaduct and the raising of the bridge, they about balance each other and leave the property in substantially as saleable a condition, at as good prices, as it was before the construction of this public improvement.

You will have noticed that the material difference in the testimony of these witnesses is their testimony of the injurious effect of this viaduct upon the selling or market value of this property—that is, the most of these witnesses are not so far apart in the question of value as in that of damages or the value before and the value after the viaduct was constructed. With the exception
139 of Mr. Law, whose estimate is that of $400 per foot, the value of the property by the other expert witnesses as to value on the part of the plaintiff, and the expert witnesses as to value, called on the part of the defendant, do not differ so much, because I judge from the gross value which was given by Mr. Higginson and Mr. Philpot and Mr. Gaubert that they estimate the equalized or average value of the frontage, because Mr. Gaubert puts the value at $350 per foot and makes it come to $47,000. Mr. Philpot puts the value at $48,000 and puts it at 375 per foot. Mr. Higginson puts it at $350 per foot, and you will see that if they have estimated that price, $300 per foot, on 167 feet it would be much more than what they make the gross or aggregate value, so that I conclude that all the plaintiff's witnesses except Mr. Law have averaged the frontage, and perhaps he intended to do so, but he said nothing on that subject one way or the other. He may have intended to do so as the others. If he had been asked the gross value of the entire lot he may have put it as Mr. Gaubert or Mr. Higginson or Mr. Baird. He was not asked to give the gross value
140 of the lot. One set of these witnesses thinks the market value has been reduced fifty to sixty per cent. by the construction of this work. The other does not think there has been any material reduction in consequence of the construction of this viaduct or by

the raising of the bridge. The real question is, then, *that* Has the market price of this property been reduced or diminished?

As bearing upon this question, proof has been offered on the part of the plaintiff tending to show that it is not so good a stand or location for the coal business or the business which has been heretofore carried on at this place as it was when the travel passed along 18th street, directly by the lot, instead of going along on the viaduct above the lot, as it does now; that not so many orders are taken in for coal at the office there and not so large a business of distributing coal from that point has been done.

The evidence is also offered on the part of the plaintiff tending to show that by reason of the raising of the grade on Lumber street and Stewart avenue, directly upon the west front of this lot at
141 the time the bridge was raised, in 1881, it is more difficult to haul loads from the lot onto the adjacent street, and that thereby much more embarrassment and expense followed for the transaction of this particular kind of business on this lot.

The proof on the part of the defendant, if not all the proof in the case, tends to show that the grade of the approach from Lumber street to the bridge is substantially the same now as it was before the bridge was raised, but that the grade of Lumber street has been raised so as to make a sharp, steep ascent from the lot onto Lumber street—that is, in raising the viaduct and in raising the approach to correspond with the raising of the viaduct they have also raised Lumber street and left the approach at substantially the same grade that it was before, but that you have got to get upon a higher starting point—that is, onto the surface of Lumber street—before you start to go up the approach, and thereby there has been a difficulty in hauling coal from the lot onto Lumber street and from thence up the approach.

142 The defendant's proof also shows without dispute that in 1867, before plaintiff bought his interest in this lot, the city authorities had fixed the grade of Lumber street and 18th street at the intersection of these two streets at about twelve feet above what is known as city datum, which is the lowest low-water mark noticed in the city. They have taken the low-water mark of 1849 as the plane or basis from which to estimate the levels and grade of the city, and that is what they call city datum, and at the point of intersection between Lumber street and 18th street the grade was fixed by ordenance of 1867 at twelve feet and a few inches above city datum, and that in raising the grade of Lumber street when the bridge was raised it was not brought quite up to the maximum or full grade which was fixed by ordenance, it being now something over eleven feet, instead of being brought up to full twelve.

If the city had fixed the grade before the plaintiff had bought this lot and fixed it in 1867, then, the plaintiff bought this lot subject to the right of the city to raise the grade to the extent fixed by the ordenance of 1867, and although
143 by the constitution of 1870 and statutes since passed by this State the owner of property damaged by public improvement is entitled to compensation, this does not entitle the plaintiff to com-

pensation for raising the grade of streets upon which his property abuts, where the grade had been fixed by city ordinance before the constitution took effect. Therefore, if the grade of Lumber street was fixed in 1867 and before plaintiff bought this lot, he cannot recover for the raising of the grade of this street to that so fixed. If, therefore, you are satisfied from the proof that one of the elements or the main element of the plaintiff's damage is the raising of the grade of Lumber street or Stewart avenue along the west front of this lot, then you should reject so much of the damage claimed as comes from the raising of the grade of these streets; so, also, it makes no difference as to the amount of damage the plaintiff is entitled to recover from the city that the city is i-demnified by any person or parties at whose instance this viaduct has been built or the grade
144 raised. The city is clothed with authority to build this viaduct, to raise the grade, to raise the viaduct, and to raise the bridges, and is amenable under the law to the property-owners for the damage occasioned, and if the city has taken the precaution to be i-demnified that makes no difference, so far as the question of damages is concerned. The case is clearly like that of a sheriff or marshal who levies by an execution upon the property of a person under his writ. He is liable to the owner of that property if he makes a wrongful levy, if he levies upon property not subject to the levy for damages which are occasioned by it, and it makes no difference whether somebody has i-demnified him or not; that does not change the value of the property or the extent of the damage to it. It does not increase and ought not to increase or be considered as increasing the plaintiff's damages in this case by the consideration that the city has somebody to fall back upon to collect whatever damages it may be adjudged to be paid in this case. The real question is, Has the value of this property to sell or rent been diminished by the construction of this viaduct? It may be that it can no longer be used
145 for the purposes of a coal yard, or for any purpose for which it has heretofore been used, but that would not be material if it can be rented or sold at as good a price for other purposes, except that if the proof satisfies you that any of the permanent improvements put on the lot for the particular business which has been heretofore carried on there and for which it was improved have been impa-red in value, or are not worth as much after this viaduct was built and the bridge was raised as before, and you can from the proof determine how much these improvements are damaged, the plaintiff would be entitled to recover for such damage to the improvements—that is to say, this lot being improved for a specific purpose, if the proof satisfies you that it can no longer be rented or used for that purpose, and that thereby these improvements have been lost or impaired in value, then the impairment of value to these improvements is one of the elements of damage which the plaintiff is entitled to have considered and passed upon and
146 included in his damage. You must also bear in mind that the plaintiff at the time the viaduct was built and when, as the plaintiff's proof tends to show, the main damage was sustained, only owned two-fifths of this lot and improvement, and it therefore

becomes necessary that you shall under the proof ascertain how much of this damage was caused by the construction of the viaduct in 1878–'79, and how much or what portion was caused by the raising of the bridge and viaduct in 1881, the plaintiff being entitled to three-fifths of the damage sustained by raising the bridge, and only two-fifths of that sustained by the viaduct at its first construction.

It is not necessary to render separate verdicts; I do not mean to be so understood, but in considering the proof you must assume as the basis of the plaintiff's claim that up to January 4th, 1881, he only owned two-fifths of this property, and was therefore entitled to only two-fifths of the damage that resulted from the building of the viaduct.

That after January 4th, 1881, he owned three-fifths and is entitled to three-fifths of the damage, if any was occasioned by the
147 raising of the bridge and viaduct in 1881. The one-fifth which plaintiff bought in 1881 did not carry with it a right to the damage which the one-fifth had sustained by the building of the viaduct in 1878. If the value of the property was reduced by the building of the viaduct in 1878–'79 the presumption would be that the plaintiff bought this one-fifth interest at a reduced price, and therefore has got the benefit of that reduction, whatever damage was done the property by the reduction in value by the reduced price at which he bought it after the viaduct was built, but he has the right to any damage which the proof shows that he sustained by the raising of the bridge and the raising of the viaduct after he purchased the one-fifth interest.

You are then to say—

First. Was the value of this property reduced by the building of this viaduct in 1878–'79 and the raising of the bridge and viaduct in 1881? And—

Second. What was the difference in the value of the property caused by these acts of the defendant in constructing these improvements?

148 The form of your verdict, gentlemen, is simply guilty or not guilty. If you say guilty, then the amount of the damages is to be added. "We, the jury, find the defendant guilty," and assess the *the* damages at so much.

The COURT to Mr. Hoyne: I suppose from Mr. Horton's argument that you wish to save an exception as to so much of the charge as instructs the jury that you are not entitled to damages for the actual raising of the grade of Lumber street.

Mr. HOYNE: Yes, sir.

The COURT: You may have an exception as to that.

Mr. OSBORN: We asked the court for certain instructions there, and I would like——

The COURT: If there is anything that I have not embodied in my charge——

Mr. OSBORN: I will simply call the attention of the court to the fact that the flooding by water we asked the court to instruct against that, and the other point was that they could not render damages

by reason of any injury occurring from the travel being diverted to another portion of the street. Those are the two points that I remember now.

149 The COURT: Well, the jury must be the judges upon this question of flooding. I had overlooked that request which counsel gave me. If you are satisfied that the flooding itself has impaired the value of the lot—its selling value—you may consider that as an element of damage. If it has merely produced a temporary inconvenience to the present occupant by reason of his coal getting wet or his scales being made difficult to keep in adjustment that would not be any element of impairment of the value of the property for the purpose of sale. The tenant, Mr. Law, may have been subjected to much inconvenience in the conduct of his business there by the flooding which you are not to consider in this case. He may have found it very difficult to haul coal out of this lot, and it may have been much more unprofitable to conduct the business of selling coal at this lot, but that does not weigh upon the question of the value of the lot in the market. The point made by the defendants simply is, as I remember it, that if another thorough-

150 fare had been opened and the public chose rather to take that other thorough- than to go on this one, that is not an element of damage which the plaintiff could complain of. For instance, it is alleged that if they had built a bridge across the river somewhere else more accessible to the public and the public had used the new route instead of 18th St.—you are to say from the testimony; in other words, whether the carrying of the travel above this lot so that people might, perhaps, have ordered coal or something else or transacted business with an occupant of the lot, if they had passed right along upon the surface of the lot, but carrying the travel above the surface of the lot, so that they do not come in contact with the lot, has diverted business to such an extent from the lot as to impair its market value.

Mr. WINSTON: There is one other point that I understood from your honor's charge that it was to assume, that as to damages arising out of the construction of the viaduct it was rather to assume that there was an indemnity, when the fact is it is just the other way, the city agreeing to i-demnify the railroad.

151 The COURT: I have told the jury they are not to consider it anyway. It is true that the ordinance of '78, under which the viaduct itself was constructed, does not give the city any indemnity. There is no indemnity to the city under the ordinance of 1878. A certain railroad contributed a portion of the expenses of constructing the viaduct itself, but they were not held liable for the damage. They simply contributed so much money, but were to pay no damage to property-owners. They were not to be liable *for*, indirectly or directly, to the city for any damages that followed. The subsequent ordinance is different, but I told you that cuts no figure in the consideration of this case.

Mr. OSBORN: The charge which the court has just made is not exactly our view of the matter, and I desire to preserve an exception as to that.

The COURT: Very well.

Whereupon the defendant then and there excepted to that portion of the charge which instructed the jury as follows:

"The jury must be the judges upon this question of flood-
152 ing. If you are satisfied that the flooding itself impaired the value of the lot—its selling value—you may consider that as an element of damage. If it has merely produced a temporary inconvenience to the present occupant by reason of his coal getting wet or his scales being made difficult to keep in adjustment that would not be any element of impairment to the value of the property for the purpose of sale. The tenant, Mr. Law, may have been subjected to much inconvenience in the conduct of his business there which you are not to consider in this case. He may have found it difficult to haul coal out of this lot, and it may have been much more unprofitable to conduct the business of selling coal at this lot, but that does not weigh upon the question of the value of the lot in the market.

"The point made by the defendant simply is, as I remember it, that if another thoroughfare had been opened and the public chose rather to take that other thoroughfare than to go on this one, that
153 is not an element of damage which the plaintiff could complain of. For instance, it is alleged that if they had built a bridge across the river somewhere else more accessible to the public that thereby the public would have gone that way. You are to say from the testimony, in other words, whether the carrying of travel above this lot, so that the people who might perhaps have ordered coal or something else or transacted business with an occupant of a lot, if they had passed right along on the surface of the lot, but carrying the travel above the surface of the lot, so that they do not come in contact with the lot, has diverted business to such an extent from the lot as to impair its market value, then you are to consider it as an element of damage.

"The real question is, then, Has the market price of this property been reduced or diminished? As bearing upon this question, proof has been offered, on the part of plaintiff, tending to show that it is not so good a stand or location for the coal business or the business which has been heretofore carried on at this place as it
154 was when the travel passed along 18th street, directly by the lot, instead of going along the viaduct, above the lot, as it does now; that not so many orders are taken in for coal at the office there, and not so large a business of distributing coal from that point has been done.

The evidence is also offered, on the part of the plaintiff, tending to show that, by reason of the raising of the grade on Lumber street and Stewart avenue directly upon the west front of this lot at the time the bridge was raised, in 1881, it is more difficult to have loads from the lot onto the adjacent street, and that thereby a much more embarrassment and expense followed for the transaction of this particular kind of business on this lot."

And to the refusal of the court to instruct the jury as suggested in propositions 5, 8, and 9, *ante*, the defendant thene and there excepted.

The jury having rendered their verdict, the defendant filed a motion for a new trial; which said motion is in the words and figures following, to wit:

155 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court Thereof.

CATHERINE TAYLOR *et al. vs.* CITY OF CHICAGO.

And now comes the said defendant and moves the court here to set aside the verdict rendered and grant a new trial, and show the following reasons for said motion:

1. The court admitted improper evidence on behalf of plaintiffs against objection of defendant.

2. The verdict is grossly excessive.

3. The court erred in refusing to instruct the jury, as suggested by defendant, as follows: "That only such damages can be recovered in this action as has been done to the market value of the property by rendering the access to the property difficult or inconvenient, and that all testimony as to the flooding of the premises in question with water from said viaduct, bridge, and approaches must be disregarded by the jury."

156 4. The court improperly instructed the jury against the exception of the defendant as follows:

"The jury must be the judges upon this question of flooding. I had overlooked that request which counsel gave me. The flooding of the street, if you are satisfied that the flooding itself impaired the value of the lot—its selling value—you may consider that as an element of damage. If it has merely produced a temporary inconvenience to the present occupant by reason of his coal getting wet or his scales being made difficult to keep in adjustment that would not be any element of impairment of the value of the property for the purpose of sale. The tenant, Mr. Law, may have been subjected to much inconvenience in the conduct of his business there which you are not to consider in this case. He may have found it very difficult to haul coal out of this lot and it may have been much more unprofitable to conduct the business of selling coal at this lot, but that does not weigh upon the question of the value of the lot in the market."

5. The court erred in admitting hearsay evidence as to an
157 alleged offer for the lot known as lot number two and in refusing to instruct the jury, as suggested by defendant, as follows:

"That all evidence concerning any offer for or refusal of a price for the lot adjoining the property in question on the south, known as lot number two, made before the viaduct was constructed is excluded from the consideration of the jury."

6. The court erred in refusing to instruct the jury, as suggested by defendant, as follows: "That any effect of the construction of the viaduct upon the value of the property in diverting public travel along 18th street to the said viaduct and from the property in question cannot be considered in this case and *from* no proper cause for recovery by the plaintiff."

7. The court erred in instructing the jury, against the exception of defendant, as follows: "The point made by the defendant simply is, as I remember it, that if another thoroughfare had been opened and the public chose rather to take that other thoroughfare than to go on this one, that is not an element of damage which the
158 plaintiff could complain of; for instance, it is alleged, that if they had built a bridge accross the river somewhere else, more accessible to the public, that thereby the public would have gone that way. You are to say from the testimony, in other words, whether the carrying of travel above this lot, so that the people who might, perhaps, have ordered coal or something else or transacted business with an occupant of a lot, if they had passed right along upon the surface of the lot, but carrying the travel above the surface of the lot, so that they do not come in contact with the lot, has diverted business to such an extent from the lot as to impair its market value, then you are to consider it an element of damage."

8. The court erred in admitting evidence in relation to two separate and distinct causes of action under said declaration.

9. The verdict is not sustained by the evidence.

10. The court erred in instructing the jury, against the exception of defendant, as follows:

159 "The real question is, then, Has the market price of this property been reduced or diminished? As bearing upon this question, proof has been offered on the part of plaintiff tending to show that it is not so good a stand or location for the coal business or the business which has been heretofore carried on at this place as it was when the travel passed along 18th street, directly by the lot, instead of going along on the viaduct above the lot, as it does now; that not so many orders are taken in for coal at the office there, and not so large a business of distributing coal from that point has been done. The evidence is also offered on the part of the plaintiff tending to show that by reason of the raising of the grade on Lumber street and Stewart avenue, directly upon the west front of this lot, at the time the bridge was raised, in 1881, it is more difficult to haul loads from the lot onto the adjacent street, and that thereby much more embarressment and expense followed for the transaction of this particular kind of business on this lot.

F. S. WINSTON, JR.,
Att'y for Def't.

(Endorsed:) Filed April 11, 1884. Wm. H. Bradley, clerk.

160 Which motion was overruled by the court and judgment rendered on the verdict; to which defendant then and there excepted.

And thereupon the defendant prayed a writ of error and plaintiff waived the filing of a bond.

And, inasmuch as the foregoing matters do not appear of record, the said defendant humbly prays that the same may be signed and sealed and made a part hereof, under and in accordance with the rules of the honorable the Supreme Court of the United States and the circuit court of the Unite- States for the northern district of Illinois, which is done.

H. W. BLODGETT, *Judge.*

Endorsed: Filed April 21, 1884. Wm. H. Bradley, clerk.

161 Afterwards, to wit, on the eighteenth day of July, A. D. 1884, there was filed in said clerk's office an appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

Bond.

UNITED STATES OF AMERICA:

In the Supreme Court Thereof.

CATHARINE A. TAYLOR, PERCY R. PYNE, MOSES TAYLOR PYNE, and Lawrence Turner, Executrix and Executors of the Last Will and Testament of Moses Taylor, Deceased,

vs.

THE CITY OF CHICAGO.

Know all men by these presents that we, the City of Chicago, as principal, and Carter H. Harrison, as surety, are held and firmly bound unto Catharine A. Taylor, Percy R. Pyne, Moses Taylor Pyne, and Lawrence Turnure, executrix and executors of the last will and testament of Moses Taylor, deceased, in the penal sum of one thousand ($1,000) dollars, to be paid to the said Catharine A. Taylor, Percy R. Pyne, Moses Taylor Pyne, and Lawrence Turnure, executrix and executors of the last will and testament of Moses Taylor, deceased, and their successors; which payment, well and truly to be made, the said City of Chicago binds itself and the said Carter
162 H. Harrison binds himself and his heirs and executors firmly by these presents.

In witness whereof the said City of Chicago has caused these presents to be signed by its mayor and its corporate seal to be hereto affixed, and the said Carter H. Harrison has signed and sealed these presents this — day of June, A. D. 1884.

Whereas the above-named The City of Chicago has prayed a writ of error from the judgment this day entered in said cause in favor of said plaintiffs, Catherine A. Taylor, Percy R. Pyne, Moses Taylor Pyne, and Lawrence Turnure, executrix and executors of the last will and testament of Moses Taylor, deceased, against the said City

of Chicago, to the Supreme Court of the United States, which said writ of error has been ordered to operate as a supersedeas upon the filing of this bond: Now, therefore, the condition of this obligation is such that if the above-named City of Chicago shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

CITY OF CHICAGO,
By CARTER H. HARRISON, *Mayor.* [SEAL.]
CARTER H. HARRISON. [SEAL.]

Attest: JOHN G. NEUMEISTER,
City Clerk.

Approved:
H. W. BLODGETT, *Judge.*

Endorsed: Filed July 18, 1884. Wm. H. Bradley, clerk.

163 Afterwards, to wit, on the second day of September, A. D. 1884, there was filed in said clerk's office a stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA, *Northern District of Illinois:*

Circuit Court of the United States for the Northern District of Illinois.

CATHARINE A. TAYLOR *et al.*, Executrix, Executors, etc.,

vs.

CITY OF CHICAGO.

It is hereby stipulated by and between the parties to the above-entitled cause that in making up the record in said cause for the Supreme Court of the United States the clerk may omit therefrom the sketch of property introduced in evidence by the plaintiff in the trial of said cause.

Dated Chicago, September 1st, A. D. 1884.

F. S. WINSTON, JR., *Att'y for Def't,*
HORTON, HOYNE & SAUNDERS,
Att'ys for Pl'ffs.

Endorsed: Filed Sept. 2, 1884. Wm. H. Bradley, clerk.

163½ Afterwards, to wit, on the tenth day of October, in the adjourned October term of said court, A. D. 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

CATHARINE A. TAYLOR *et al.*, Executrix of Moses Taylor,

vs.

CITY OF CHICAGO.

Trespass on the case.

Now come the said plaintiffs, by Mess. Horton, Hoyne and Saunders, their attorneys, and said defendant, by F. S. Winston, Jr., its attorney, and it appearing to the court that on the seventeenth day of March, 1884, and before the trial of said cause was commenced said plaintiffs had leave of court to file additional counts to their declaration, to which said defendant then and there excepted, and that such counts were so made out and placed among the papers of said cause, but by inadvertence said counts were not marked filed by the clerk, it is now, therefore, by consent of the attorneys of the respective parties, ordered that said counts be now filed by the clerk as of said day, and that the plea of the defendant on file herein be taken and deemed the defendant's plea to said counts as well as to the original declaration, but said defendant does not waive, but reserves and insists upon its exception to the order of court granting plaintiffs leave to file, said additional counts.

164 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein Catharine A. Taylor, executrix, &c., *et al.* are the plaintiffs and the City of Chicago is the defendant as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this tenth day of October, A. D. 1884.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY, *Clerk.*

165 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is before you in said circuit court, be-

tween Catharine A. Taylor, Percy R. Pyne, Moses Taylor Pyne, and Lawrence Turner, executrix and executors of the last will and testament of Moses Taylor, deceased, plaintiffs, and The City of Chicago, defendant, in an action of trespass on the case, a manifest error hath happened, to the great damage of the said The City of Chicago, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1884, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 28th day of April, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the 108th year.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY,
Clerk U. S. Circuit Court, Nor. Dist. of Illinois.

[Endorsed:] Supreme Court of the United States. The City of Chicago, plaintiff in error, *vs.* Catharine A. Taylor *et al.*, defendants in error. Writ of error. Copy deposited for the defendants in error in the clerk's office U. S., northern district of Illinois.

166 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

To Catharine A. Taylor, Percy R. Pyne, Moses Taylor Pyne, and Lawrence Turner, executrix and executors of the last will and testament of Moses Taylor, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1884, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Catharine A. Taylor *et al.* are the plaintiffs and The City of Chicago is the defendant, to show cause, if any there be, why the error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, district judge, this 6th day of October, in the year of our Lord one thousand eight hundred and eighty-four.

H. W. BLODGETT, *Judge.*

167 [Endorsed:] Supreme Court of the United States. —— —— *vs.* —— ——. Citation to October term, A. D. 18—.

We hereby accept service of the within writ for the defendants in error.

Oct. 7, 1884.

HORTON, HOYNE & SAUNDERS, *Att'ys.*

Endorsed on cover: N. Illinois C. C. U. S. No. 151. The City of Chicago, plaintiff in error, *vs.* Catharine A. Taylor, Percy R. Pyne, Moses Taylor Pyne, and Lawrence Turner, executrix and executors of Moses Taylor, deceased. Filed 22d October, 1884.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1887.

No. 151.

THE CITY OF CHICAGO,
Plaintiff in Error,
vs.
CATHARINE A. TAYLOR, PERCY R. PYNE, MOSES TAYLOR PYNE and LAWRENCE TURNURE, as Exutrix and Executors of the last will and testament of Moses Taylor Deceased,
Defendants in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR PLAINTIFF IN ERROR.

FREDERICK S. WINSTON,
ATTORNEY FOR PLAINTIFF IN ERROR.

JOHN W. GREEN.
HAYNES & EASLEY.
OF COUNSEL.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO

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Error to the Circuit Court of the United States for the Northern District of Illinois.

Brief for Plaintiff in Error.

Statement of the Case.

This is a suit brought to recover damages claimed to have been sustained by the owner of an undivided interest in a certain lot in the city of Chicago, by reason of the construction of a viaduct upon a public street of the city in front of such lot.

The suit was originally brought by Moses Taylor, a citizen of the State of New York, against the city of Chicago, a municipal corporation, and the declaration in the case was substantially as follows:

First Count. Plaintiff alleges that at the time of the committing of the grievances mentioned he was the

owner of an undivided three-fifths of a certain lot situated on the south side of 18th street and the east side of Lumber street, and that such streets intersect and are public highways of the city; that 18th street is a thoroughfare of the city, with a bridge across the Chicago river, forming a connecting link between the west and south divisions of the city; that the next nearest bridges are four blocks distant from 18th street upon either side, and that 18th street is therefore the outlet for a large portion of the city, and that plaintiff's property was of great value, to wit: $50,000; that such property has a frontage upon 18th street of, to wit: 150 feet, and a frontage upon Lumber street of, to wit: sixty feet, at the intersection of such streets. That the defendant, well knowing, etc., "constructed a viaduct or bridge in said 18th street past the "property of said plaintiff, cutting off all access to said "plaintiff's property from said 18th street, and from said "plaintiff's property on Lumber street, except by means "of an approach so steep that it is practically useless. "By means whereof the said premises of said plaintiff "have been greatly damaged and depreciated in value, to "wit: more than dollars, and have rendered them "altogether undesirable for the purposes for which the "same were adapted, or for any purpose whatever." Plaintiff then avers that the viaduct is built mainly of iron and masonry, with suitable approaches, and is intended as a permanent structure and improvement, and that the damage to plaintiff's property will be permanent and lasting. Plaintiff further avers that said viaduct was built without his consent, and without making compensation to him, or instituting proceedings to ascertain his damages. (Original Rec., 6–9.)

Second Count. This is substantially the same as the

first count. It avers that the property is situated at the intersection of 18th street and Lumber street, that said streets are both public highways of the city, and that "prior to the grievances hereinafter mentioned there was "convenient, direct and easy access to said premises from "both of said streets, which right of access or communi- "cation was of great value to said premises, and the said "premises were by reason thereof, of great value, "to wit: of the value of fifty thousand dollars." It is averred in this count that the defendant "constructed a "viaduct or bridge along said 18th street, and thereby "cut off and prevented access to said premises from said "18th street, and prevented access to said premises from "said Lumber street, except by way of an approach so "steep that it is practically useless, and also thereby cre- "ated a nuisance in the near vicinity of said premises by "reason of the noise, confusion, shaking and dust caused "by teams, cars, wagons, and other vehicles passing on "and over said viaduct, and also thereby dirt, dust, filth "and other materials are and from thence hitherto have "been driven and blown off the said viaduct upon said "premises, and into and through the buildings thereon, "thereby greatly interfering with the reasonable enjoy- "ment of said premises." By means whereof, the said premises are alleged to have been greatly damaged and depreciated in value, and the occupants of the same to have been hindered and annoyed, and the value of said premises greatly reduced, wherefore the plaintiff brings his suit.

To this declaration the general issue was pleaded. Moses Taylor having died during the pendency of the action, his death was suggested and the executrix and executors were substituted as plaintiffs. Leave of court having

been obtained, there was filed by the new plaintiffs, on January 15, 1883, an additional count. This count alleges that Moses Taylor at the time of his death was the owner of an undivided interest in the lot mentioned in the original declaration, and that the same was occupied by a certain tenant and had certain improvements thereon, used in carrying on the coal business and for wharfing and docking purposes; that the premises are on the south side of 18th street and on the east side of Lumber street, both of which streets are public highways of the city, and that prior to the grievances mentioned there was direct and easy access to said premises from both such streets, which access was of great value to the premises; that 18th street is a great thoroughfare of the city, with a bridge across the Chicago river, and forms a connecting link between the west and south divisions of the city; that the next nearest bridges are some four blocks distant from 18th street, upon either side, and that 18th street was therefore the outlet for a large portion of the travel and business of said city; that because of the importance of such street as a thoroughfare and the access to both such streets from said premises, the reversionary interest of Moses Taylor in the property was worth, to wit: $50,000. That the defendant, well knowing, etc., without the leave or license of said Moses Taylor, "constructed a viaduct or bridge in said 18th street "past the property of said Moses Taylor, cutting off all "access to said property from said 18th street and "from said property to Lumber street, except by means "of an approach so steep that it is practically useless." The count avers that the viaduct is intended as a permanent structure, and that the damage to the reversionary interest is a permanent one; that the viaduct was

built without the consent of Taylor and without compensation to him, and without instituting any proceedings to ascertain the damages. "By means of which said several "premises the said Moses Taylor in his life-time was per- "sonally injured, prejudiced and aggrieved in his rever- "sionary estate," and the plaintiffs have sustained damages as executrix and executors of the estate. (Rec., 16–20.)

During the trial of the case, leave was asked by plaintiffs to file additional counts in the case, and was granted against the objection of the defendant. The first of these additional counts avers ownership by Moses Taylor of an undivided two-fifths of the premises at the time of the construction of the viaduct by the city; that the premises were in the possession of Robert Law, as tenant, and were used by him as a coal-yard; that the city constructed the viaduct in 18th street, past the property of said Moses Taylor, "cutting off all access to said prop- "erty from said 18th street and obstructing the said 18th "street and interfering with its use as a public highway, "and constructed in connection with said viaduct a road- "way or approach in said 18th street, and on the south "side thereof extending from said Lumber street, along "the north side of said premises, up to said viaduct, said "approach being of the width of about twenty (20) feet "and being an incline so steep and narrow that it is prac- "tically useless as a means of approach to said viaduct "and to said 18th street bridge; and the plaintiffs aver "that said approach is so constructed as to cut off all ac- "cess from said premises to said 18th street and to said "viaduct upon the level of said viaduct, and is a barrier "and obstruction in said 18th street between the said "premises and the said viaduct, and by reason of the "construction of said viaduct in said 18th street, the dirt,

"dust and other materials are thrown and shaken down "onto the said premises, and the water is turned off of "said viaduct and down said approach and onto the said "premises, thereby flooding said premises and interfering "with the use and occupation thereof, and thereby rend- "ering the same practically useless for use and occupa- "tion for wharfing purposes and the purpose of carrying "on the business of handling and storing coal, stone, or "other material, and greatly depreciating the value of the "reversionary interest of the plaintiffs therein."

The second count alleges the ownership by Moses Taylor of an undivided three-fifths of the premises, and avers that the defendant "caused the said viaduct and "approach to the same in said 18th street to be "raised above its then level, to wit: three (3) feet, and in "connection with said viaduct also caused the said ap- "proach to be changed and raised so as to make the "grade or ascent steeper than it was before, and so "changed the level of said approach at the foot thereof "at Lumber street and raised the grade of said Lumber "street at the foot of said approach as to make said ap- "proach practically useless as an approach to said viaduct "and to cut off all access to said property from said 18th "street, except by said approach, and the plaintiffs aver that "by reason of said change and the raising of the grade "of said viaduct and bridge, and of said approach and dam- "age to the reversionary interest of said Moses Taylor, "deceased, has been and is and will be permanent and "lasting, and the plaintiffs aver that by reason of the lo- "cation of said premises on the bank of said river, and "by reason of the surroundings of said premises the same "can only be used for dock purposes and for the storing "and handling of coal, stone, or other heavy material,

"and that the building of the said viaduct and approach "and the raising of the grade of the same has rendered "said premises practically useless for the purposes afore- "said by reason of the difficulty and expense which must "necessarily be caused in removing coal, stone, and other "material from said premises, and that by reason of the "construction of said viaduct in said 18th street, the "dirt, dust and other materials are thrown and shaken "down on the said premises and the water turned off of "said viaduct and down said approach and onto the said "premises, thereby flooding said premises and interfering "with the use and occupation thereof and rendering the "same practically useless for use and occupation for "wharfing purposes and for the purpose of carrying on "the business of handling and storing coal, stone and "other material, and greatly depreciating the value of the "reversionary interest of the plaintiffs therein." (Rec., 22–32).

To a proper understanding of the exact nature of the injuries alleged to have been sustained, it will be essential for the court to observe the plans and profiles incorporated in the record, at pages 18, 32 and 34. The injuries complained of were caused by two distinct improvements. In the first place, the viaduct was constructed by the city of Chicago along 18th street, in front of plaintiff's property in the year 1879. The necessity of this viaduct arose from the fact that 18th street was crossed at right angles and at grade, by a number of steam railroad tracks immediately west of plaintiff's property. These tracks are shown on the plan at page 34, and are the main and switch tracks of the Pennsylvania system and of the Chicago and Alton Railroad Company. These tracks being in constant use by the railroads, rendered the passage by

the public along 18th street subject to danger and delay. To meet this, the city proceeded to erect a viaduct along 18th street, over these railroad tracks, to enable the people to cross the river at that point without the hindrance arising from intercepting railroads. In order that access to and from plaintiff's property might not be cut off by this viaduct, the following plan was pursued. Twenty-two feet of the width of the street, next to the plaintiff's property, was left substantially in its original condition, namely, with an inclined approach in front of the lot on 18th street, up to the bridge. The viaduct proper was placed along the more remote portion of the street, the idea being that plaintiff's property should still have the same means of access as before, and at the same time the general public should be enabled to travel along 18th street without crossing the railroad tracks on a level. At the time the viaduct was constructed plaintiff owned an undivided two-fifths of the lot in question.

In the second place, it became necessary for the city of Chicago, in the year 1881, to raise the bridge at 18th street a little over three feet. This necessitated a corresponding raise of the viaduct previously built, and of the approach in front of the plaintiff's lot. The raising of this approach was accomplished in this way: the grade, or incline, of the approach was allowed to remain as before; this incline was about one foot in nineteen, and being an easy and practical grade, was not disturbed. But the bridge being raised some three feet, required that the approach, being at the same incline or grade as before, should extend further toward the west. The result of this was to raise the grade of the intersecting street, Lumber street, to a corresponding extent. This was claimed as an additional element of damages.

The property in question is a piece of ground used for many years as a coal yard. It is bounded as follows: on the north by 18th street, on the east by the Chicago river, on the west by Lumber street and by Stewart avenue, which intersect at this point, the latter street being filled with railroad tracks, and on the south by another lot. It is essential to note that the office and scales of the coal yard were at the corner of 18th street and Lumber street. Before the construction of the viaduct on 18th street in 1879, the plaintiff had access to and from his lot on Lumber street, also on 18th street in the following manner: going east up the approach to the bridge at a grade of one foot in nineteen, and thence across the bridge to the business portion of the city, and going west, by passing along 18th street, at a grade across the large number of railroad tracks lying west of his property and crossing 18th street. After the construction of the viaduct plaintiff's access to and from Lumber street remained as before. His access to and from 18th street was changed in these particulars: in going east there was the same incline as before, except that such incline occupied twenty-two feet of the width of the street, instead of the entire width; in going west he was saved the difficulty and danger of crossing the railroad tracks at a level, but on the other hand he was obliged to use the incline in order to reach the viaduct, and there turning to proceed westward. The act of the city in raising the viaduct and bridge some three feet in 1881 was not considered in the court below as a very serious element of damage, but the stress was laid upon the damage inflicted by the original construction of the viaduct.

The value of the property was estimated by the various witnesses at from $30,000 to $50,000, and the jury found

that the reversionary interest of plaintiff had been damaged to the extent of $6,800. As plaintiff owned but an undivided two-fifths at the time the main injury was sustained, this represents a total of something like $17,000 damage to the entire property, exclusive of the tenancy, upon the valuation of from $30,000 to $50,000. In other words, the property was found to have been damaged by the viaduct all the way from thirty to sixty per cent. of its value, exclusive of the damage to the tenant. One ground that was urged upon the motion for a new trial in the case was, that the verdict was grossly excessive, but it is not expected that this court would disturb the judgment upon this ground. It will be insisted here, however, that the elements which were considered by the jury in estimating this damage were without legal basis, and the court will be asked to reverse the judgment, because the verdict of the jury was based upon certain evidence and certain instructions of the court, which were not warranted in law.

It is admitted that 18th street and Lumber street are public streets of the city of Chicago, and that the city of Chicago is a municipal corporation vested by the laws of the State of Illinois with the following powers:

"To lay out, to establish, open, alter, widen, extend, "grade, pave or otherwise improve streets, alleys, ave- "nues, sidewalks, wharves, parks and public grounds, "and vacate the same.

"To construct and keep in repair bridges, viaducts and "tunnels, and to regulate the use thereof."

It is further admitted that plaintiff's intestate was the owner of the undivided interest in the reversion of the premises in question at the time of the construction of the viaduct and its subsequent raising, and that such via-

duct was constructed and subsequently raised by the city of Chicago under the authority conferred upon it by the legislature of the state.

The constitution of the State of Illinois, adopted in 1870, provides as follows:

" Private property shall not be taken or damaged for " public use without just compensation."

The question before the court is, the extent to which damages can be recovered under the pleadings and under the circumstances of the case at bar.

The questions involved and the manner in which they are raised may be succinctly stated as follows:

First. That the court erred in admitting evidence tending to show that the property was damaged because public travel along 18th street was diverted from that portion of the street immediately in front of plaintiff's property to and along the viaduct constructed in such street, and in instructing the jury that such diversion was a proper element to consider in determining how much the value of plaintiff's property had been depreciated.

Second. That the court erred in admitting evidence of the interruption of business and loss of profits upon the premises in question, and in instructing the jury to consider such loss of profits and interruption of business as an element in ascertaining the damages to the market value of the property.

Third. That the court erred in admitting evidence as to damage done by every element of damage incident to the structure, instead of confining the evidence to those features of the damage for which the plaintiffs were entitled to recover by law, under the pleadings of the case.

Errors Assigned.

Now comes the City of Chicago, plaintiff in error, by its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. That the court erred in overruling the objection of the plaintiff in error to the following questions asked the witness, Law, and in admitting the answers to same:

"Q. Has, or not, the trade conducted upon this prop-"erty been affected by the improvement?

"A. Yes, sir; very much.

"Q. In what respect? Improved or otherwise? "Damaged?

"A. Our sales were not twenty per cent. what they "were before the viaduct was built. Our books will "show it, and I can prove it by my clerk." (Rec., 54.)

And that the court erred in overruling the motion of plaintiff in error to strike out the last answer as not being responsive, and as being incompetent and not formed upon a proper basis.

Second. That the court erred in refusing to instruct the jury, as suggested by plaintiff in error, as follows:

"That any effect of the construction of the viaduct "upon the value of the property in diverting the public "travel along 18th street to the said viaduct, and from "the property in question, cannot be considered in this "case, and forms no proper cause for recovery by the "plaintiff." (Rec., 130.)

For that the diversion of public travel from in front of

this property, caused by the providing for the public a better thoroughfare, was not a proper element of damages in the case.

Third. That the court erred in instructing the jury, (Rec., 152-3) against the exception of the plaintiff in error, as follows:

"The point made by the defendant simply is, as I re-
"member it, that if another thoroughfare had been
"opened, and the public chose rather to take that other
"thoroughfare than to go on this one, that is not an ele-
"ment of damage which the plaintiff could complain of.
"For instance, it is alleged, that if they had built a bridge
"across the river somewhere else, more accessible to the
"public, that thereby the public would have gone that
"way. You are to say from the testimony, in other
"words, whether the carrying of travel above this lot, so
"that the people who might, perhaps, have ordered coal,
"or something else, or transacted business with an occu-
"pant of a lot, if they had passed right along upon the
"surface of the lot, but carrying the travel above the sur-
"face of the lot, so that they do not come in contact with
"the lot, has diverted business to such an extent from the
"lot as to impair its market value, then you are to con-
"sider it as an element of damage."

Fourth. That the court erred in instructing the jury against the exception of the plaintiff in error, as follows:

"The real question is, then, has the market price of
"this property been reduced or diminished? As bearing
"upon this question, proof has been offered on the part
"of plaintiff, tending to show that it is not so good a
"stand or location for the coal business, or the business

"which has heretofore been carried on at this place, as it "was when the travel passed along 18th street, directly "by the lot, instead of going along by the viaduct above "the lot, as it does now. That not so many orders are "taken in for coal at the office there, and not so large a "business of distributing coal from that point has been "done." (Rec., 153-4.)

For that the loss of business done upon the property in question is too vague and speculative to be considered by a jury in determining the diminution in the value of the lot upon which such business is transacted.

Fifth. That the court erred in admitting against the objection of plaintiff in error, the following testimony of the witness, Law:

"Q. What was the property worth after the street "changes were made—immediately after—as affected by "the construction of the viaduct?"

To which the witness replied:

"It destroys more than fifty per cent. of the value of "the property." (Rec., 55.)

For that such evidence embraced more elements of damage from the structure than a recovery is allowed for by law, and embraced elements of damage which were not covered by the issues in the case, and was, therefore, incompetent.

This assignment of error applies to the evidence of each of the experts who testified for the plaintiffs.

And the said city of Chicago prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of said judgment.

Brief and Argument.

Before entering upon a detailed discussion of the several errors assigned in this case, it would seem to be proper to first direct the attention of the court to the general law governing actions of this character. The constitution of the State of Illinois, adopted in 1870, provides that "private property shall not be taken *or damaged* "for public use without just compensation." The words, "or damaged," are new matter, not previously incorporated in the statutory or organic law of the state. The law of Illinois, as to the extent to which a property owner was entitled to recover for damages arising from a public improvement placed in the street in front of his property, prior to the adoption of this constitution, is well stated in the decision of this court in the case of *Transportation Company* v. *Chicago*, 99 U. S., 635. In that suit compensation was claimed for the consequential damage resulting from the construction, by the city of Chicago, of a tunnel beneath the Chicago river, with an approach to the same in LaSalle street. This court held in that case as follows:

"Here the tunnel, of which the plaintiffs complain, or rather its construction, was authorized by an act of the legislature of the state, and directed by an ordinance of the city councils. This we do not understand to be denied, and it certainly cannot be. The state, and the city councils, as its agents, had full power over the highways of the city, to improve them for the uses for which they were made highways, and the construction of the tunnel was an exercise of that power. Since LaSalle street was extended across the river, the city not only had the power, but it was its duty, to provide for convenience of passage. This it could do, either by the erection of a bridge, or by the construction of a tunnel under the river and along the line of the

street. And the grant of power by the legislature to build a bridge or construct a tunnel carried with it, of course, all that was necessary for the exercise of the power. We do not understand this to be controverted by the plaintiffs in error. Their argument is, that though the city had the legal right to construct the tunnel, and to do what was necessary for its construction, subject to the condition that in doing the work there should be no unnecessary interference with private property, yet it was liable to make compensation for the consequential damages caused to persons specially injured. To this we cannot assent.

"It is immaterial whether the fee of the street was in the state or in the city or in the adjoining lot-holders. If in the latter, the state had an easement to repair and improve the street over its entire length and breadth, to adapt it to easy and safe passage.

"It is undeniable that in making the improvement of which the plaintiffs complain the city was the agent of the state, and performing a public duty imposed upon it by the legislature; and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill, is a doctrine almost universally accepted alike in England and this country. It was asserted unqualifiedly in *The Governor and Company of the British Cast-Plate Manufacturers* v. *Meredith*, 4 Durnf. & E., 794; in *Sutton* v. *Clarke*, 6 Taunt, 28, and in *Boulter* v. *Crowther*, 2 Barn. & Cres., 703. It was asserted, in *Green* v. *The Borough of Reading*, 9 Watts (Pa.), 382; *O'Connor* v. *Pittsburg*, 18 Pa. St., 187; in *Callender* v. *Marsh*, 1 Pick. (Mass.), 418, as well as by the courts of numerous states. It was asserted, in *Smith* v. *The Corporation of Washington*, 20 How., 135, in this court, and it has been held by the Supreme court of Illinois. The decisions in Ohio, so far as we know, are the solitary exceptions. The doctrine, however, it may at times appear to be at variance with natural justice, rests upon the soundest legal reason.

"The state holds its highways in trust for the public. Improvements made by its directions or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it.

"But it is the prerogative of the state to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the state is compelled to employ. The remedy, therefore, for a consequential injury resulting from the state's action through its agents, if there be any, must be that, and that only, which the legislature shall

give. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the constitution of every state, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right or action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542, and notes.

"The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly* v. *Green Bay Company*, 13 Wall., 166, and in *Eaton* v. *Boston, Concord & Montreal Railroad Co.*, 51 N. H., 504. In those cases it was held that permanent flooding of private property may be regarded as "taking." In those cases there was a physical invasion of the real estate of the private owner and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiffs' lot. All that was done was to render, for a time, its use more inconvenient.

"The present constitution of Illinois took effect on the 8th of August, 1870, after the work of constructing the tunnel has been substantially completed. It ordains that private property shall not be "taken or damaged" for public use without just compensation. This is an extension of the common provision for the protection of private property. But it has no application to this case, as was decided by the Supreme court of the state in *Chicago* v. *Rumsey*, recently decided, and reported in Chicago Legal News, Vol. X, p. 333. That case also decides that the city is not liable for consequential damages resulting from an improvement made in the street, the fee of which is in the city, provided the improvement had the sanction of the legislature. It also decides that LaSalle street is such a street, and declares that a recovery of such damages by an adjacent lot-holder has been denied by the settled law of the state up to the adoption of the present constitution. There would appear, therefore, to be little left in this case for controversy."

This case was decided in 1878. In the year 1883 the Supreme court of Illinois had before it the case of *Rigney* v. *City of Chicago*, 102 Illinois, 64. This was an action to

recover consequential damages for cutting off certain access to and from plaintiff's property by the construction of a viaduct in a public street of the city. In that case three of the seven judges decided that the constitution of 1870 made a change in the former rule of law, so as to permit a recovery for the consequential damages arising from a lawful work, where such a recovery could not have been had prior to that constitution. These three judges held, that the decisions of the Illinois Supreme court, which had been rendered since the adoption of the constitution of 1870, and which denied a recovery for such consequential damages, were mere *obiter dicta* not binding, and that the law of Illinois, under the present constitution, is as follows:

"The question then recurs, what additional cases did "the framers of the new constitution intend to provide for "which are not embraced in the old? While it is clear "that the present constitution was intended to afford re- "dress in a certain class of cases for which there was no "remedy under the old constitution, yet we think it "equally clear that it was not intended to reach every "possible injury that might be occasioned by a public im- "provement. There are certain injuries which are neces- "sarily incident to the ownership of property in towns or "cities which directly impair the value of private property, "for which the law does not, and never has afforded any "relief. For instance, the building of a jail, police sta- "tion, or the like, will generally cause a direct depreciation in the value of neighboring property, yet that is "clearly a case of *damnum absque injuria*. So as to an "obstruction in a public street, if it does not practically "affect the use or enjoyment of neighboring property, "and thereby impair its value, no action will lie. In all

"cases, to warrant a recovery, it must appear there has "been some direct physical disturbance of a right, either "public or private, which the plaintiff enjoys in connec- "tion with his property, and which gives to it an addi- "tional value, and that by reason of such disturbance he "has sustained a special damage with respect to his prop- "erty in excess of that sustained by the public generally. "In the absence of any statutory or constitutional provis- "ions on the subject, the common law afforded redress in "all such cases, and we have no doubt it was the intention "of the framers of the present constitution to require "compensation to be made in all cases where, but for "some legislative enactment, an action would lie by the "common law."

"The English courts, in construing certain statutes "providing compensation for injuries occasioned by pub- "lic improvements, in which the language is substantially "the same as that in our present constitution, after a most "thorough consideration of the question, lay down sub- "stantially the same rule here announced. *Chamberlain* "v. *West End R. R. Co.*, 2 Best and Smith, 605, 110 E. "C. L. R., 604 *id.*, 617; *Beckett* v. *Midland Ry. Co.*, L. "R., 1 C. P., 241; on Appeal, 3 C. P., 82; *McCarthy* v. "*Metropolitan Board of Works*, L. R., 7 C. P., 508."

Three other judges of the court dissented and held that the Rigney case was a departure from the established law as laid down by the court in other decisions, and the remaining judge, who had the casting vote, decided as follows:

"It seems more reasonable, and consonant with the "spirit of our present constitution, to say that the owner "of such lot holds the same endowed with the benefits

"arising from being adjacent to the street, subject to such "inconvenience as may result from the use of the street "as a highway by the public, and subject to the right of "the public to improve the same as a highway, in any "ordinary and reasonable mode deemed wise and bene-"ficial to the public, by the proper public functionaries. "It is not every change of grade made in a street, which "may in effect impair the value of the lot in its vicinity, "which is a violation of the right of the proprietor there-"of. Such changes in the street as it may reasonably be "supposed might be made for the improvement of the "public highway, the purchaser of a lot upon a street "must be assumed to have consented to when the pur-"chase was made. The making of such changes is "therefore no invasion of his right in that regard. But "it cannot be assumed that the purchaser gave his assent "to sudden and extraordinary changes in the grade of a "public highway, such as it is unreasonable to suppose a "purchaser at the time of the original sale, or when he "made improvements, would naturally anticipate might "be required for the improvement of the public high-"way."

The Rigney case, quoted above, is the leading case of Illinois at the present time, and the opinion of the majority of the court has since been followed in other cases.

The next case in point is *City of Chicago* v. *The Union Building Ass'n*, reported in the same volume, at page 379. This was an action to recover consequential damages to property abutting upon LaSalle street, in the city of Chicago, by reason of the act of the city in vacating a portion of said street. The opinion of the court is a unanimous one. After quoting with approval the extract from

the opinion in the Rigney case, first above printed, the court proceed as follows:

"In the McCarthy case, thus approvingly referred to, "Lord Chelmsford, in stating the rule governing, said: "'The learned counsel for the defendant proposed the fol- "lowing rule as a guide to the decision of each case: "Where, by the construction of works authorized by the "legislature, there is a physical interference with a right, "whether public or private, which an owner of a house "is entitled by law to make use of in connection with "the house, and which gives it a marketable value apart "from any particular use to which the owner may put it, "if the house, by reason of the works, is diminished in "value, there arises a claim to compensation. I think the "rule as thus stated may be accepted, with this necessary "qualification: that where the right which the owner of "the house is entitled to exercise, is one which he pos- "sesses in common with the public, there must be some- "thing peculiar to the right in its connection with the "house, to distinguish it from that which is enjoyed by "the rest of the world." See 10 Eng. Rep., (Moak's notes) 1. See, also, to like effect, *Lyon* v. *Fishmonger's Co.*, (1 Appeal Cases, 662), 17 Eng. Rep., (Moak's notes) 51.

The court then considers the nature of the private right which a property owner has in the street upon which his property abuts, as distinguished from the right of the public generally, and sums up as follows:

"As held in *Rigney* v. *Chicago*, *supra*, property hold- "ers bordering upon streets have, as an incident to their "ownership of such property, a right of access by way "of the streets, which cannot be taken away or materially

" impaired by the city without incurring legal liability to " the extent of the damages thereby occasioned, and to " this extent, perhaps, it may be said there is a special " trust (not shown in the present case to have been " affected) in favor of adjoining property holders. *But* " *in no other respect do the property owners or citizens* " *of the municipality have a right in the street other or* " *different than that of the public generally.*"

The next case in point of order is *Provision Co.* v. *City of Chicago,* 111 Ill., 651. This was an action to recover damages to property by reason of access, to and from the same, having been cut off by the construction of the identical viaduct complained of in the case at bar. The point decided in the Provision Co. case is, that the railroad company which contributed towards the expense of the construction of the viaduct did not thereby become jointly liable with the city as a tort feasor. The court held that the structure is a lawful one, and that an individual or corporation which aided financially in the construction was not guilty of a tort and liable for the damages done by the viaduct.

Next follows the case of *City of Chicago* v. *McDonough*, 112 Ill., 85. The only question raised in that case was, whether the court below had allowed the plaintiffs to recover for injuries done to the possession, they being owners simply of the reversion, and the court held that the evidence and the instructions were confined to damages done to the reversionary interest. The gist of the action in the latter case was the obstruction of access to and from the property, and that the defendant carried away and converted to its own use a stone sidewalk in front of the property.

The last case, involving the liability of a municipality or damage to private property, by reason of the doing of a lawful act, is the case of *East St. Louis* v. *O'Flynn*, decided in 1887, and reported in 119 Ill., 200. In that case the municipality had vacated certain streets of the city in the vicinity of plaintiff's property, but not the street upon which his property abutted. The jury found the property had been damaged by the vacation, and the city carried the case to the Supreme court on appeal. It was contended by the property owner that he was entitled to damages under the clause of the constitution here in question, and also under the following statutory provision: "When property is damaged by the vacating or "closing of any street or alley, the same shall be ascer- "tained and paid as provided by law." The Supreme court decided that plaintiff's damages were not such as to warrant a recovery. The access to, and egress from his lot were not affected by the vacating ordinance passed by the city, and the court held that the inconvenience that would be occasioned to plaintiff in going from the street in front of his house to a particular part of the city, on account of vacating and closing up certain streets and alleys in another block, was the same kind of damage that would be sustained by the public generally.

The above are believed to be all the decisions of the Supreme court of Illinois rendered since the Rigney case, which involve the liability of a municipality for damage done to private property by reason of the performance of an act authorized by law.

From the decisions above cited it will be observed that the Supreme court of Illinois has construed the constitutional provision in regard to damage done to private

property, as allowing a recovery only where there is some "direct physical disturbance of a right which the "plaintiff enjoys in connection with his property." As the court hold in the Rigney case, "In the absence of any "statutory or constitutional provisions on the subject, the "common law afforded redress in all such cases, but we "have no doubt it was the intention of the framers of the "present constitution to require compensation to be made "in all cases where, but for some legislative enactment, "an action would lie by the common law."

The Supreme court of Illinois follows the decisions of the English courts in their construction of the Land and Clauses Consolidation acts, requiring compensation to be made where property is "injuriously affected."

In the case of the *Caledonia Railway Co.* v. *Ogilvy*, 2 Macqueen (31 Ap. Cases), page 229, the Lord Chancellor uses the following language:

"These acts of Parliament are, as unfortunately is too "often the case, loosely worded; but the construction that "is put upon this expression, 'injuriously affected,' in the "clauses in the act of Parliament which gives compensa- "tion for injuriously affected lands, certainly does not en- "title the owner of lands, which he alleges to be inju- "riously affected, to any compensation in respect to any "act which, if done by the railway company without the "authority of Parliament, would not have entitled him to "bring an action against them. I purposely guard myself "in putting it in that way, because I am far from admit- "ting that he would have a right of compensation in some "cases in which, if the act of Parliament had not passed, "there might have been not only an indictment, but a "right of action. And the necessity of so guarding my-

" self is made apparent by one of the last cases quoted by " Mr. Anderson, the case of *Greasley* v. *Codling*, which, " if the law be applicable to a railway, would certainly " entitle everybody who is stopped for a minute while the " gates are shut to an action for damages; because it " would be said, under the authority of that case, which I " think is a very correct decision, that where an act is " done, such as shutting gates across a public road, with- " out the authority of Parliament, that gives the parties a " right of action. If, therefore, the act of Parliament did " not mean to exclude the right of compensation in some " cases, in which, if the act had not passed, there would " have been redress, every person who is stopped for a " moment while the gates of a railway are shut at a level " crossing, would be entitled to an action."

It may be considered as settled, therefore, that a recovery can be had in those cases only where, but for some legislative enactment, an action would lie by the common law. Where the action lies, the *measure of damages* is uniformly held to be, in the case of real property, the depreciation in the market value thereof, by reason of those elments of the act complained of, for which the plaintiff would be entitled to redress at common law. To put the rule in a different form, the word "damage" in the present constitution of Illinois, has no greater effect than to remove the barrier interposed by law to the recovery of damages for the consequential effects of a work authorized by the state. As stated by this court in *Transportation Co.* v. *Chicago, supra*, the reason for the rule that no recovery could be had for consequential damages from the construction of a work authorized by the state, rests upon the basis that neither the state nor municipalities, when acting as agents of the state, can be sued except by

consent of the state. In short, therefore, the new constitutional provision as to "damage," simply gives the consent of the state to such suits being brought as would lie at common law, but for the constitutional inhibition referred to.

The question before the court in the case at bar is, whether the different elements of damage for which the recovery was permitted in the court below, are authorized by the common law.

The several counts of plaintiff's declaration are based, first, upon the allegation that the construction of the viaduct, and its subsequent raising, impaired the access to and egress from the property in question, and, second, that the effect of the viaduct, and its subsequent raising was to flood the premises and cast upon them dirt and dust. There was no evidence in the case as to dirt and dust, and the only physical damage claimed arose from the flooding. This flooding, under the decisions of Illinois, constitutes a "taking," and for that damage a recovery could have been had prior to the present constitution. The first allegation of damage is for a purely consequential one, and there can be no reasonable doubt, under the decisions of Illinois, that for consequential damages for cutting off or destroying the access to and from the property of plaintiff, a recovery can be had under the present constitution. All of the Illinois decisions cited are cases where injury to the right of access of the plaintiff, to and from his property, was the damage for which compensation was claimed. In allowing a recovery for the destruction or impairment of the right which a private property owner has in the access to and egress from his property, the Supreme court of Illinois has reached its limit. Consequential damages more remote than this have never been

allowed, but, as we have seen above, the court has expressly refused to allow a recovery where the property has been damaged by reason of the property owner being deprived of access or communication, other than the access to and from his lot.

Plaintiff in error here contends that there was no authority in law for the court below to permit the jury to consider the damage done to the property by reason of public travel along 18th street being diverted from that portion of the street immediately in front of plaintiff's property, and that the interruption of business and loss of profits upon the premises was not a proper element for the jury to consider in determining the damage done to the property by the viaduct.

There are necessarily many features in the construction of a viaduct, in front of private property, which plainly fall within the rule of *damnum absque injuria*. A viaduct in front of a man's property is undoubtedly an unsightly object. Like the construction of a jail or a police station in a neigborhood, it doubtless affects the value of the property unfavorably, because it is offensive to the taste, or fails to harmonize with the sense of the beautiful. But for such damage to the market value of the property the law affords no recovery. Again, the construction of a viaduct may, and does, cut off light and air, and in that way depreciate the market value of the property. But a recovery could not be had in Illinois against a private individual who thus cuts off his neighbor's light and air, and as the action would not lie at common law against an individual, no recovery could be had against the city, under the present constitution, as construed by the Supreme court.

These and similar injuries done the property by the construction of the viaduct, which will readily occur to the court, are elements of damage for which the law does not, and never did, warrant a recovery. Hence it would seem plain that the court below erred in permitting plaintiffs' witnesses to testify, against the objection of defendant, as to the *entire* damage done through the construction of the improvement. The evidence was too broad, and the instruction of the court that the jury should award plaintiffs the depreciation in the market value of the property, caused by the construction of the improvement, without regard to the particular elements of damage which may have been done by such improvement, obviously permitted a recovery for some elements of damage which are unwarranted in law. Particular complaint is made as to the recovery allowed for the alleged diversion of travel from plaintiffs' lot, and as to the evidence and instructions regarding the loss of business by plaintiffs' tenant on the premises. The objections of plaintiff in error in these particulars are not mere technical points, but it is earnestly insisted that the bulk of the verdict rendered against the city, was based upon these improper considerations. It was testified by Robert Law, the tenant of the premises in question, and the principal witness for plaintiffs, when asked to explain to the jury in what the damage done the property consisted, as follows:

"Q. Now, in what, in your opinion, consists the dam-
"age; what is the cause of the injury which you think
"was done to your property, to that property, by the
"construction of the viaduct?

"A. People that used to go past my office, direct on "the level ground, would drop in and order coal. They "now go above me. I don't know how much above; the "viaduct is nearly on a level with our chimney top on our "office; we are down in the cellar. They won't go to "18th street bridge and go back again. Parties going "down with teams make it more objectionable now, be- "cause they can't cross on 18th street and Stewart "avenue; they have to go back around by the bridge "again, and people won't go there, and they don't go to "my office. *That is the principal element of damage to "the lot.*" (Rec., 61.)

The court thus charged the jury upon this feature of the case:

"The point made by the defendant simply is, as I re- "member it, that if another thoroughfare had been opened "and the public chose rather to take that other thorough- "fare than to go on this one, that is not an element of "damage which the plaintiff could complain of. For in- "stance, it is alleged that if they had built a bridge across "the river somewhere else, more accessible to the public, "that thereby the public would have gone that way. You "are to say from the testimony, in other words, whether "the carrying of travel above this lot, so that the people "who might perhaps have ordered coal or something else "or transacted business with an occupant of a lot, if they "had passed right along on the surface of the lot, but "carrying the travel above the surface of the lot, so that "they do not come in contact with the lot, has diverted "business to such an extent from the lot as to impair its "market value, then you are to consider it as an element "of damage."

It will be seen, therefore, that the proposition is squarely presented, whether there is a liability for damage done by reason of the city authorities providing the public with a better thoroughfare, which resulted in their taking the new thoroughfare, whereby business was diverted from this particular piece of property. There is no question but that the market value of the property was damaged from this cause, and there can be little doubt but that this constituted the main element of damage; but we insist that it is not such an element of damage as would warrant a recovery at common law. The question is, really, a very old one. It was elaborately discussed and decided in the leading case, *Charles River Bridge* v. *Warren River Bridge*, 7 Pickering, 344.

Among the opinions delivered in that case was that of PARKER, C. J., as follows:

"It is the right and duty of all governments, especially "those over new countries, to facilitate the intercourse of "business between its subjects by opening new roads and "constructing new avenues as the population, and the "consequent demands for such improvements, shall in- "crease. In doing this it will often happen, that estates "upon old roads are diminished in value; that the seat of "business may be transferred from one town or village "to another; inns and stores, erected with a view to the "travel or business as it exists, may become deserted and "of little value; but the proprietors would have no "claim upon the government for redress, for it is ne- "cessarily one of the contingencies upon which property "is acquired, and held, that it is liable to be impaired by "events of this kind.

"The whole history and policy of this country, from its

"first settlement, furnish instances of changes and im-
"provements, the effect of which has been to transfer the
"adventitious value of real estate in one town, resulting
"from its favorable position for trade, to another, which
"by alteration of roads, erection of bridges, or more
"recent interior settlements, has taken its place as a
"thoroughfare, or as a place of transit or deposit for ar-
"ticles of merchandise. Losses of this kind never have
"been, and probably never will be compensated; nor can
"compensation be reasonably expected by the sufferers,
"any more than by the dealers in any branch of trade or
"in any mercantile employment, who find their profits
"and emoluments diminished and sometimes destroyed
"by the change of fashion, or by new inventions for car-
"rying on the same branch of business in a cheaper and
"more acceptable manner. Such losses are the effect
"of the general system of legislation upon subjects of
"this nature, adopted in the early part of our history
"and subsequently practiced through all the changes of
"government; so that property is in fact held upon a
"tenure which admits of its deterioration in value from
"causes of this kind."

The case of *Hyde Park* v. *Dunham*, decided in 1877, reported in 85 Ill., 569, was a condemnation case where damages were claimed for property not taken for the widening of a street, but injuriously affected because of the new street being made a more attractive thoroughfare than the street upon which the property, claimed to be damaged, was situated. The court hold that this is a damage for which there can be no recovery, and use the following language:

"The corporate authorities of Hyde Park are vested
"with complete control, as is every other municipal cor-

"poration, over its streets. They may contract or widen "them whenever, in their opinion, the public good shal "so require. Property owners purchase and hold sub- "ject to these powers, and they have no vested right to "deny the widening, contracting or otherwise improving "any street. The damage which they may sustain in "consequence of the exercise of such powers, where their "property is neither taken nor directly injured thereby, is "too remote and contingent to be susceptible of accurate "computation; and if, for every such damage, compensa- "tion must be made, public improvements will become "so burdensome as to be beyond the capacity of muni- "cipal corporations to bear. All city and village prop- "erty is constantly liable to changes in values by reason "of changes in centers of trade, and even by reason of "changes in the judgments and prejudices of the citizens, "and these may be, and oftentimes are, controlled or "largely affected by public improvements being made of "a more convenient and attractive character in the one "locality than in the other; but for such damage it has "never been attempted to make compensation, and we "are unable to perceive any practicable way by which it "could be done."

This decision, it will be noted, is made under the present constitution of the state, and considers the nature of the damages contemplated, in the eminent domain law of the state, by the word "damage."

In the case of *Rickett* v. *Metropolitan Railway Co.*, L. R. 2 H. L. Eng. & Irish App., 175, 193, the Lord Chancellor held as follows:

"Upon the 16th section of the railway clauses' act, "which does apply to this case, his damage was not of

"such a nature as to entitle him to compensation; the in-
"terruption of persons who would have resorted to his
"house, but for the obstruction of the highway being a
"consequential injury to the plaintiff in error, too remote
"to be within the provisions of that section."

In the same case Lord CRANWORTH arrived at the same conclusion, and held:

"The very existence of a railroad must cause loss to
"many persons in its neighborhood. Every inn or post-
"ing house, at which post horses were kept, suffered, as is
"well known, grievous loss by the first establishment of a
"railroad in its neighborhood; in fact, the business of such
"a house was often utterly destroyed. But it was never
"contemplated that this was an injury to the house, under
"the sixth section, for which compensation could be de-
"manded. The house sustained no injury, though the pro-
"fits of the occupier were diminished or destroyed. Such
"a claim, if sustainable, would admit of no limit. The
"railroad would, it is true, affect the custom of posting
"houses near to it, but it would, or might, diminish the
"quantity of posting to an almost indefinite extent, and I
"can discover no limit to the claims which, on the doc-
"trine asserted, might be successfully made."

To the same effect also is *King* v. *London Dock Co.*, 5 Ad. & E. Reports, 163.

It will be remembered that plaintiff's property is situated on two thoroughfares of the city, Lumber street and 18th street. No change was made in Lumber street, except a slight raising of the grade of some three feet. As this raise in grade did not bring the street above the grade as fixed by ordinance, prior to the constitution of 1870, the court very properly held that there could be no recovery

by reason thereof. The diversion of public travel complained of, arose in this way. Before the construction of the viaduct, the public, in passing from the west division of the city to the south division, or vice versa, would cross 18th street bridge if they were within, say two blocks north or south of 18th street. The next nearest bridges being four blocks distant on each side, it may be assumed that the 18th street bridge would be crossed by those within two blocks of 18th street. Then those people, for example, crossing from the west division to the south division, would proceed east towards the river until they reached Lumber street, or some other street intersecting 18th street, and turning on such street to 18th street, would pass plaintiff's lot and then cross the bridge to the south division. In order that they might reach the bridge it was always necessary that they should cross at grade the railroad tracks intersecting 18th street and the parallel streets. The result of the viaduct, therefore, was that people desiring to cross 18th street bridge no longer travel east, say to Lumber street, and there turn to 18th street, cross the bridge. Such a course involves crossing the railroad tracks at grade. In preference to this, the public now prefers the viaduct over the railroad tracks, which gives them a safer and more convenient access between the two divisions of the city. It is entirely practical now, as before, for the public to go east to Lumber street, crossing the railroad tracks at grade, and there turning to reach the bridge at 18th street by the approach in front of plaintiff's lot, which is at the same incline as before. But the viaduct is a safer and a more convenient method of reaching the bridge; hence it is preferred by the public, and in consequence the tide of travel is diverted from immediately in front of plaintiff's lot.

It is apparent that a like diversion of the travel from in front of plaintiff's lot would be caused by any act of the municipality in providing a better passage way on the opposite side of 18th street. If the city had constructed instead of the viaduct a better sidewalk, on the north side of 18th street than on the south side, travel would likewise be diverted. The erection of a few additional lamp posts on the north side of the street would have, to some extent, the same effect. More attractive shops on the north side of the street would influence travel to that portion of the thoroughfare. The establishment of another coal yard opposite the plaintiff's lot, with cheaper prices for the commodity, would unquestionably divert trade from plaintiff's property. All of these cases are instances of diversion of travel of the same kind as that for which the plaintiffs were permitted to recover in the court below. Let us suppose that the city had constructed the viaduct entirely on the private property on the north side of 18th street, and had left 18th street precisely in its original condition. The public would then have the choice of crossing the railroad tracks at grade upon 18th street, or of crossing by way of a viaduct. There can be no question but that travel would then be diverted almost entirely from 18th street, and would cross between the west and south divisions of the city by way of the viaduct erected on the private property, and there would be precisely the same diversion of travel complained of in this case. The public would be afforded by the municipal authorities with a better thoroughfare, and would consequently desert the street upon which plaintiff's lot abuts. Can it be contended for a moment that a recovery could be had in that case for the diversion of travel? Yet the two cases are identical in

principle. It is true that in the case at bar travel is not only diverted, but plaintiff's access to and egress from his lot is somewhat impaired. But it is not disputed that for this effect of the viaduct he is entitled to recover. It is insisted, however, that for the other element of damage, namely, the diversion of travel, he is no more entitled to a recovery than if the travel were diverted by reason of a viaduct placed on private property. Take another illustration. Suppose that the city, in the exercise of its discretionary power to bridge the Chicago river, should construct a bridge at the next street parallel to 18th street of the improved type, a double-track bridge operated by steam power. There can be no doubt but that public travel between the two divisions of the city would seek the new bridge, of larger size and more quickly turned after the passage of vessels, than the old bridge at 18th street. The bulk of the travel across the bridge at 18th street would, therefore be diverted. The market value of plaintiff's property would then be diminished. Yet, under the doctrine of *Hyde Park* v. *Dunham, supra*, there can be no question of liability on the part of the municipal authorities for such a diversion of travel. It is understood that the city authorities, under the plenary power concerning bridges, might abandon 18th street bridge, or fail to appropriate money for its operation, or remove it to some other point, if such removal was required by the interests of navigation, or might conclude not to rebuild or replace the bridge in case the same were destroyed, and that plaintiffs would be without redress.

Goodrich v. *City of Chicago*, 20 Ill., 447. II Dillon's Mun. Corps., (Third Ed.) Sec. 836.

In such a case as that just mentioned, the market value of plaintiff's lot would be diminished to a very great ex-

tent. Yet, upon what legal ground could there be a recovery? Instances might be multiplied, *ad infinitum*, of a diversion of travel, from in front of plaintiff's lot, by the city providing better and more convenient methods of communication between different sections of the city, or by a variety of other causes. But it is believed that no case can be found in this state where a recovery has ever been permitted upon such a basis. A striking illustration of this character of injury is shown in the recent removal of the site of the Board of Trade of Chicago. This great commercial body required in the neighborhood of its hall a large number of offices, which were rented to its members and those doing business with them. When it was determined by this body to erect a building of its own, and to remove from its former headquarters, the city council vacated a portion of LaSalle street to enable them to obtain sufficient ground upon which to erect their building. The owners of the building formally occupied by them, sought to enjoin this vacation of LaSalle street, but were defeated in the case of *Union Building Ass'n* v. *Chicago*, heretofore cited. Subsequently the owner of an office building in the neighborhood of the former location of the board of trade, perceived that the rental value of his building would be greatly diminished by the removal of the board of trade from his neighborhood, and sought to enjoin the vacation of the street, and to thus defeat the removal; but his bill was dismissed, and the decree was affirmed in the case of *Hesing* v. *Scott*, 107 Ill., 600. Such examples of the diminution or enhancement of the value of property in large cities are constantly occuring. They constitute, when values are lowered, real pecuniary losses, but such losses are incident to the ownership of property in cities, and are strictly *damnum absque injuria*.

Suppose that this suit was an action by the tenant, Law, and was brought, not against the municipality, but against a private individual, upon the ground that such individual diverted travel or trade from Law's place. Assume that this diversion arose because the defendant afforded a more convenient access to his place of business, or greater facilities to intending purchasers. Would the tenant, Law, be entitled to recover against such an individual? If a recovery could not be had in such a case, how can it be claimed that a recovery may be had against the city by reason of trade or travel being diverted from the premises by reason of better facilities for public travel being given to the people?

Consider for a moment, the result of holding municipalities liable for the loss in value of property by reason of the public being afforded an improved method of intramural communication. No improvement could be made in any street; no new pavement put down; no new sidewalk laid; no lamp-posts erected, without giving one thoroughfare the advantage over another, and thus diverting, to some extent, the public travel to the improved thoroughfare. To say that such improvements warrant a recovery for the diversion of travel thus occasioned, is to paralyze all municipal progress; yet a recovery was permitted in the court below upon just this theory. The court, in its charge, told the jury that the claim made by the defendant was, that if another thoroughfare had been established and the public chose rather to take that other thoroughfare than to go on 18th street; that the defendant claimed that this was not an element of damage which could be complained of, and the court then proceeded to reject this proposition and to instruct the jury to consider such diversion of travel as an element of damage.

We come to the consideration of the evidence and the instructions of the court in regard to loss of business or profits of the plaintiff's tenant. Against the objection of the defendant, the tenant and joint owner, Robert Law, was permitted to testify as to the damage done by the viaduct to the trade conducted upon the property, and to show that his sales of coal were not twenty per cent. of what they were before the viaduct was built. In other words, that since the construction of the viaduct he had not done one-fifth of the business that he had done before. Upon this point the court instructed the juty that they should consider, "that not so many orders are taken in "for coal at the office there, and not so large a business "of distributing coal from that point has been done."

At the time this case was tried it was believed by the defendant that evidence of this character was not competent under the decision of the Supreme court of Illinois, because it was too speculative, vague and uncertain to serve as a proper element in determining the amount of damage. The Supreme court had then decided the cases, *City of Chicago* v. *Huenerbein*, 85 Ill., 594, and *Booker* v. *Railway Co.*, 101 Ill., 333. The former was an action of case to recover damages for flooding certain land. The court below admitted evidence as to the profits that might have been made upon the land, but for the act of the city in causing the same to be overflowed. The Supreme court held as follows:

"The rule for the assessment of damages was wrong. "In cases of this character the true measure is the fair "rental value of the ground which was overflowed, and "not the possible, or even the probable, profits that might "have been made had the land not been overflowed. "Such damages are too remote and speculative, depend-

" ing on too large a variety of contingencies which might " never have happened."

The latter case cited was a proceeding to condemn the right of way for a railroad, and the court held that evidence as to the profits upon the produce of the soil was uncertain, and could not be depended upon as a measure of damages. Since the trial of the case at bar, the Supreme court of Illinois has finally settled the doctrine in this state, that evidence of this character is improper, and should not be allowed. The case of *Railway Co.* v. *Walsh*, was published in the Illinois Reports after the judgment in this case, and will be found in 106 Ill., 253. That case was a proceeding, under the Eminent Domain Act, to condemn property for a railroad depot. The court there held as follows:

"There can be no plainer proposition than the cash " value of the property condemned was the sum appellee " was entitled to recover as damages. All legitimate evi- " dence tending to establish that sum was proper, and all " evidence that tended to enhance the damages above, or " reduce them below that sum, was illegitimate and im- " proper. The inquiry should have been confined to the " market value of the property, *and all evidence of the* " *amount of business that was or could be done in it*, or " the probable profits arising therefrom, *was improper*, " *and should have been rejected.* The purposes for which " it was used and designed, its location and advantages as " to situation, were proper matters of consideration by " the jury; but the profits of the business of the past, " and conjectural profits for the future, were too specula- " tive and uncertain upon which to ascertain the market " or cash value of the property. The question was, not " the value of the property for a short term of years, but

"the entire property, and its value. Here evidence was "admitted to show the sales of liquor in the saloon each "each day, and the profits accruing from these sales. "Such sales depend so largely on varying circumstances "that the damages are purely speculative. Whether "there shall be licenses granted to keep saloons in the "municipality is contingent, and wholly uncertain. No "one can say that when appellee's license expires, he or "others can procure another for years, if ever, after- "wards. That all depends upon the discretion of the "municipal authorities. Again, one person can do a "greatly larger business in the same calling, at the same "place, and under the same circumstances, than another. "It may be that appellee could, in that saloon, do double "the amount of business that any other person could do. "Such considerations are purely contingent, and altogether "speculative, and cannot form the basis for fixing the "price of the property, and its market value was the "question involved, and which the jury were required to "find. That was the measure of the damages they were "to assess."

"The question as to the number of guests that stopped "at the house daily, was of the same character. That "depended upon a great number of contingencies. As "one witness answered, the house was sometimes full, "and sometimes it was not."

In the case of *Railroad Co.*, v. *Dresel*, decided still later, and reported in 110 Ill., 89, an Eminent Domain case, the court held the following instruction to be correct: "The "jury are instructed that there can be no recovery for "loss of business or loss of profits." In the most recent case decided, *DeBuol* v. *Railway Co.*, 111 Ill., 499, also

an Eminent Domain case, the court approved the following instruction:

"The jury are instructed that in estimating the compensation to the defendant, Scheller, they should not take into consideration the profits, past, present or future, of the business of said defendant as a wine manufacturer, but the jury should disregard all testimony with regard to such profits, as the same, in law, form no part of the compensation to which said defendant is entitled in this case."

It is the unquestioned law of the state of Illinois, that upon an action for taking or damaging private property, evidence as to the business done upon the premises is not a proper element to consider in determing the effect upon the market value of the property. Plaintiff's tenant was allowed to testify that he did not sell one-fifth as much coal since the construction of the viaduct as before. The jury were told by the court to consider this evidence in determining to what extent the market value of the premises had been affected by the viaduct. It must be apparent that such evidence is entirely too speculative to serve as a criterion for the effect of the viaduct upon the market value of the reversionary interest of plaintiffs. Whether, during the period of time immediately after the construction of this public improvement the temperature averaged lower or higher than before the improvement does not appear. Whether plaintiff's tenant had joined the coal combination, or "trust" before or after the construction of the viaduct and when he raised his prices; whether a larger number of coal dealers were in business in Chicago after 1879 than before; whether the quality of the coal for sale by Law was as good after as

before; whether there was a general increase or decrease in the consumption of the particular kind of coal sold by him; none of these things appear. But the jury were told to consider the fact, that the sales of coal by Law upon the premises was less than one-fifth of the sales made before the viaduct was constructed, as a criterion by which to measure the diminution in the market value of the reversionary estate.

Suppose that this action was in the name of the tenant, Law, to recover for the loss of business. It is clear that under the decisions he could not recover, for the reason that such damage is of too uncertain and speculative a character. *A fortiori* evidence of this character can not be admitted as a criterion of the effect of the viaduct upon the market value of the reversionary interest in the lot. As a recovery can not be had in Illinois, under the decisions of that state, for the loss of business or profits caused by the doing of a lawful act, it certainly follows that no recovery is warranted for any diminution in the market value of the property, which is caused by such business or profits being lost through said improvement. This element of damage is too vague and speculative and the objections to its consideration are clearly no less emphatic when it is used as a standard, or guage by which to measure the effect upon the market value of the realty.

It is entirely within bounds to say that the new constitutional provision in regard to "damage" to private property has proved a most serious obstacle to municipal improvements. The City of Chicago is the great railroad centre of the country. All the companies enter the city at grade. As a result, the municipality is intersected and crossed in every direction by steam railroads. The demands for better and safer communication between differ-

ent parts of the city, and for relief from the difficulties and danger always incident to crossing railroad tracks at grade, are becoming daily more pressing and urgent. No relief is practicable, except by the construction of viaducts in the public highways over these tracks. The cost of the viaducts, with their approaches, is but a trifle as compared with the incidental damages claimed by the property owners. To the amount of such damages there appears to be no limit. New ailments and new grievances have sprung into existence which were never before imagined, and it is wonderful to contemplate the variety and multiplicity of damages which a public improvement can now bring into existence. The sound policy of the old rule, that a private property-owner holds his property subject to any consequential damages that may arise from the erection on the public highway of a lawful structure, is constantly being vindicated. It is doubtful if a constitutional convention could now be convened in the State of Illinois which would again incorporate in the organic law the provision in regard to indirect damage to private property so far as the same is caused by public improvements. Under the old rules of law the streets of Chicago were raised from the marsh some fifteen or eighteen feet, with no great financial expenditure by the city. It would be a curious problem to inquire how such a feat could be now accomplished without the financial ruin of the municipality. The indirect damages to property-owners by the raise in grade of the streets would, under the present constitution, financially swamp the city. This constitutional provision is a tremendous handicap upon every municipal improvement of the public highways. It particularly affects the construction of viaducts over railroad tracks which cross the streets of the city, and Chicago is

struggling to-day in its endeavor to improve its street facilities, and, at the same time, meet the demands of the owners of the property which is claimed to be injured by such public improvements.

It is, therefore, of vital importance to the public at large that the courts shall closely and strictly confine the claim of property-owners to those elements of damage for which a recovery could have been had at common law. In the case at bar, it is submitted that a recovery was permitted for elements of damage for which the claimant could not have recovered if the viaduct, instead of being a great public improvement, authorized by the law of the state, had been a private and unauthorized structure.

Respectfully submitted.

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JOHN W. GREEN,
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Of Counsel.

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125-161

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1887.

CITY OF CHICAGO, *Plaintiff in Error,* vs. CATHARINE A. TAYLOR, PERCY R. PINE, MOSES TAYLOR PINE and LAWRENCE TURNURE, Executrix and Executors of Moses Taylor, Deceased. *Defendants in Error.*	Error to the Circuit Court of the United States for the Northern District of Illinois.

Brief and Argument for Defendants in Error.

GEO. A. FOLLANSBEE,
ATTORNEY FOR DEFENDANTS IN ERROR.

HOYNE & FOLLANSBEE,
OF COUNSEL.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO

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Brief and Argument for Defendants in Error.

Statement of Case.

This is a suit brought originally by Moses Taylor against the City of Chicago for damages to his property by the building of a viaduct in 18th street in front of his property, and by the subsequent raising of the viaduct and the approach to it.

The death of plaintiff was subsequently suggested and his executors substituted as parties.

Several counts were filed, and the defendant filed a plea of general issue, which was allowed to stand to all of them. (Rec., 163½.)

The plaintiff alleged in his declaration that the premises had thereon certain improvements, buildings, etc., for handling and storing coal and for wharfing and dock purposes, and that by the construction of the viaduct access to 18th street was cut off, and the water turned off onto the premises, thereby flooding them and rendering them practically useless for wharfing purposes and for the purpose of carrying on the business of handling and storing coal, stone, or other materials, thereby depreciating the value of the propery. (Rec., 23–26.)

The declaration sets forth particularly the situation and surroundings of the property, and the damages which he claimed.

It appears by the evidence that the effect of the construction was to render the property less accessible from 18th street, and access to the street from the property more difficult, thereby impairing the market value of the property.

It appears that the old street (18th street) was in effect destroyed by the viaduct; abutments and piers were erected in it and the roadway raised some twenty feet aboye the old street level. This roadway occupied the greater portion of the street, leaving an approach along the property twenty-two feet in width, so that instead of having a frontage upon a street sixty-six feet in width, the effect of the construction was to give the property a frontage upon an inclined plane of twenty-two feet in width, and remove the main thoroughfare away from plaintiff's property and raise it to such a height as to make it practically useless so far as access to and from the property was concerned.

The case was tried before a jury and a verdict rendered for $6,800.

Upon the trial there was no dispute as to the possession and title of the plaintiff. The point in issue was whether the plaintiff had sustained damages, and if so, how much. Upon the part of the plaintiff witnesses were called, who testified that the property had been materially damaged by the construction of the viaduct, and, as experts, testified to the amount of such damages. As is usual in such cases, they vary in their estimates of the damages sustained, fixing them from forty to sixty per cent. of the value of the property. Upon the part of the defendant real estate dealers were called, as experts, who testified in substance that the property had not been damaged by the improvement.

This conflicting testimony was commented upon by the court in its instructions, and the questions fairly submitted to the jury, whether or not the plaintiff had sustained damages, and if so, in what amount.

Having the witnesses before them and aided and instructed by the court, the jury, upon consideration, arrived at the conclusion that the property had been damaged, and rendered their verdict accordingly, giving to the plaintiff less than the amount stated by any one of the plaintiff's witnesses.

The defendant entered a motion for a new trial in the case, which was argued and overruled.

The grounds stated for the new trial are contained in the motion embodied in the record, and we assume will be the reasons urged in this court why this case should be reversed. We have not as yet been favored with the brief of counsel for plaintiff in error, and shall, therefore, argue the case upon this assumption, as we are not advised by the printed record what errors are assigned.

Brief and Argument.

The constitution of Illinois provides that "private property shall not be taken *or damaged* for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury as shall be prescribed by law."

Constitution of 1870, Art. 2, Sec. 12.

The legislature of Illinois, under this provision of the constitution, has provided one way for ascertaining such compensation. The Eminent Domain Act, Sec. 1, repeats the language of the constitution, that private property shall not be taken *or damaged* for public use without just compensation, and then provides for the manner of ascertaining the value of the property taken for public use, or the *damage* to property not actually taken.

Therefore, under the constitution and laws of Illinois the plaintiff was not limited in his damages to the actual physical injury to his property, but was entitled to all damages resulting to his property by the construction of this viaduct, and this damage not having been ascertained by condemnation proceedings under the statute, the plaintiff was entitled to recover in a suit against the city.

In the case of *Rigney* v. *City of Chicago*, 102 Ill., 64, this constitutional provision was construed by the Supreme court of Illinois. That case was also for damages by reason of the construction of a viaduct. There was no direct physical injury done to the premises of the plaintiff in that case, but the *gravamen* of the plaintiff's complaint was

that the defendant, the City, in cutting off his communication with certain streets, had deprived him of the public right which he enjoyed in connection with the premises, and thereby inflicted upon him an injury in excess of that shared by him with the public generally. The court says that in the absence of any constitutional provision on the subject it would be competent for the legislature to authorize the taking or damaging of private property for public use, and that the owner would be without redress so far as any common law remedy is concerned. But the court, in construing this constitutional provision in connection with the provisions in the former constitutions of the state, holds that it was intended to afford redress in that class of cases, in which there was no remedy under the old constitutions, and regard the addition of the words "*or damaged*" in the constitution as having been inserted for the very purpose of allowing damages beyond those caused by direct physical injury to the property. This case reviews the authorities in Illinois up to the time of its decision, and clearly settles the law in regard to the measure of damages in this case. It is such a construction of our constitution and laws as will be regarded by this court.

This construction of our court is supported by the decisions of the English courts in construing statutes providing for compensation for injuries where the property was "injuriously affected," which words they construe as synonymous with the word "damaged." These cases are cited and relied upon by our court.

See *Chamberlin* v. *West End London Railway Co.*, 2 Best & Smith, 605, 110 E. C. L. R., 604.

Beckitt v. *Midland Railway Co.*, L. R. 1 C. P., 241. On appeal 3 C. P., 82.

McCarthy v. *Metropolitan Board of Works*, L. R., 7 C. P., 508.
Hall v. *Mayor of Bristol*, L. R., 2 C. P., 322.
East and West India Docks Co., v. *Gattke*, 3 McN. & G., 155.

This construction has also been adopted in other cases in Illinois.

C. & W. I. R. R. Co. v. *Ayres*, 106 Ill., 511.
City of Pekin v. *Brereton*, 67 Ill., 477.
C. & E. I. R. R. v. *Loeb*, 118 Ill., 203.

I.

It is claimed by plaintiff in error that the court admitted improper evidence on behalf of plaintiffs below against the objection of defendant below. The evidence complained of may properly be considered under three heads.

1. Evidence as to the value of improvements upon the land.

2. Damage caused by water flowing on to the premises.

3. Evidence as to the effect upon the business conducted upon said premises.

1. It appears by the evidence of Robert Law (Rec., 50), that the improvements were owned in the same proportion as the land and by the same owners. They were

erected and used for the purpose of carrying on upon the premises a coal business, and it appears from the evidence that owing to the location and surroundings of the premises, and the fact that they were upon the river having dockage, they were peculiarly adapted to the coal business, or to some similar business requiring dockage and the handling of heavy material.

The improvements were a part of the real estate, and in ascertaining the value of the real estate the value of these improvements were properly and necessarily considered.

The Supreme court of Illinois has frequently held that the value of the improvements is a proper element in the consideration of damages.

DeBoul v. *F. & M. R. R. Co.*, 111 Ill., 499.

Village of Hyde Park v. *Washington Ice Co.*, 117 Ill., 233.

Chicago & Evanston R. R. Co. v. *Dresel*, 110 Ill., 89.

L. S. & M. S. Ry. v. *C. & W. I. Ry.*, 100 Ill., 21.

These cases establish the rule that not only may the value of the improvements be considered in estimating the damages, but they go further and hold that where the property is adapted to a special use, or is occupied and used for a special purpose or business, that evidence of its value or that business or purpose may be offered and compensation allowed accordingly.

The property in question was shown to be peculiarly adapted to the coal business; the improvements were erected for that purpose and were an important elment in

the value of the property. Plaintiff did not ask for the value of the improvements, but for the depreciation in value of the whole property, of which the improvements formed a part, by the erection of the viaduct.

See also

St. L., J. & S. R. R. v. *Kirby*, 104 Ill., 345.

Johnson v. *F. & M. R. R.*, 111 Ill., 413.

In the first cases the property was used as a training track, and the court held that the plaintiff should be compensated for the loss to him.

In the second case the land had a special value for railroad purposes beyond its market value. The court held that the plaintiff could recover such value.

2. The damage caused by the flooding of the premises of the plaintiff was a proper element in this action in ascertaining the damage sustained by the plaintiff.

The cases already cited are broad enough to cover this element, but this question has been expressly decided by our Supreme court.

Nevins v. *City of Peoria*, 41 Ill., 503.

T. W. & W. Ry. Co. v. *Morrison*, 71 Ill., 616.

City of Aurora v. *Reid*, 57 Ill., 29.

The same question has also been considered by this court, in construing the provision of the constitution of Wisconsin, in which the language is that "the property "of any person shall not be taken for public use without "just compensation therefor." In that case the argument for the defendant was that there was no taking of the land within the meaning of the constitutional provision, but

that the damage was a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation. This court in referring to this provision, say:

"It would be a very curious and unsatisfactory result "if in construing a provision of constitutional law, always "understood to have been adopted for protection and secu- "rity to the rights of the individual as against the govern- "ment, and which has received the commendation of jurists, "statesmen and commentators as placing the just principles "of the common law on that subject beyond the power of "ordinary legislation to change or control them, it shall be "held that if the government refrains from the absolute "conversion of real property to the uses of the public, it "can destroy its value entirely, can inflict irreparable and "permanent injury to any extent, can, in effect, subject it "to total destruction without making any compensation, be- "cause, in the narrowest sense of that word it is not taken "for the public use. Such a construction would pervert "the constitutional provision into a restriction upon the "rights of the citizen, as those rights stood at the common "law, instead of the government, and make it an authority "for invasion of private right under the pretext of the pub- "lic good, which had no warrant in the laws or practices of "our ancestors."

Pumpelly v. *Green Bay Co.*, 13 Wall., 166.

And so to say in this case, under a constitutional provision which declares that private property shall not be taken or *damaged* without just compensation, that the plaintiff cannot recover for damages caused by water, the effect of which may be to destroy entirely the beneficial use and enjoyment of his property, would be to disregard the spirit of the constitutional provision, and might in effect

deprive the citizen of all remedy for a total destruction of his property, if it should happen that the damage caused by the flooding of his premises should render it unfit for occupation.

3. Another ground of complaint was the admission of evidence as to the effect upon the business carried on upon the premises.

The court will notice that plaintiff did not seek to recover for profits which might have been earned in that business, but the evidence was introduced for the purpose of showing that the result of the construction of a viaduct had been to render the premises less available for the purposes for which it is especially adapted. This was competent under the authorities already cited. In the cases referred to it was held to be proper to show the use to which the premises were put in order to ascertain the damage. In one of the cases referred to the premises were occupied and used for gardening (*DeBoul* v. *F. & M. Ry. Co.*); in another for the cutting of ice (*Village of Hyde Park* v. *Washington Ice Co.*); and in another the main value consisted in the fact that they constituted part of a railroad track, and the crossing would result in damage beyond the mere value of the land taken (*L. T. & M. T. Ry.* v. *C. & W. I. Ry.*) The evidence objected to, tended to show that the premises were rendered less valuable for the purposes for which they were specially adapted.

There was no evidence offered to show the extent of the business done upon the premises nor what the profits had been in the past, nor the probable profits in the future. So that this evidence does not fall within the rule stated in the case of *Railway Co.*, v. *Walsh*, 106 Ill., 253.

It was not offered with a view of showing the *value* of

the property as in the Walsh case. Its only purpose was to show that the property was not as valuable for the business for which it was especially adapted, and that the effect of the construction of the viaduct had been to injuriously affect its use and occupation for that purpose.

The court below so understood and so instructed the jury, as we shall show further on.

How could the jury have ascertained from this evidence what the property was worth prior or subsequent to the erection of the viaduct? There is nothing in it upon which to base an opinion, there is no attempt to draw from it any inference as to the rental value of the property or what it was capable of producing, but the bare fact is presented that the business carried on upon the premises was injuriously affected by the viaduct as a circumstance which tended to show that the property was less valuable than before.

Again the witness stated this fact as one of the grounds upon which he based his opinion that the property had been rendered less valuable for the purposes for which it was adapted.

It was proper for the witness to state the grounds upon which his opinion was based.

Snyder v. *W., U. R. R. Co.*, 25 Wis., 60.

In that case the court says:

"In this case the witnesses stated what, in their opin-
"ion, was the depreciation in the market value of the
"farm in consequence of the road passing over it, together
"with some resons and facts why it was diminished in
"value. It is said that, in giving their opinion as to the
"amount of damages to the lands which were not taken,
"they naturally and necessarily included in their estimate

" remote and fanciful injuries which possibly might occur
" by reason of operating the road. We do not so under-
" stand their testimony. True, some of the witnesses
" were asked why it was that the residue of the farm was
" so greatly diminished in value in consequence of the
" road crossing it, and they gave various reasons. They
" said it was inconvenient and troublesome to cross the
" track, from one part of the premises to another, with
" cattle and agricultural implements; that there was more
" or less danger to person and property when so doing;
" that grain and property near the track were exposed to
" fire from locomotives; that horses were liable to be
" frightened by passing trains of cars, and to run away
" and destroy property; and that, on account of these
" things, the farm was less valuable. But this evidence was
" not introduced for the purpose of laying the basis for the
" recovery of damages for such remote and speculative
" injuries. The manifest object of it was to account for
" the decrease in the value of the property. For the wit-
" nesses say the actual depreciation in the salable value of
" the farm resulted from these things. That is, all per-
" sons wishing to buy property would not pay so much
" for it, because of such possible injuries and exposures.
" And by as much as the real value of property was
" diminished, in consequence of such inconveniences, dan-
" gers, and annoyances resulting from the construction of
" the road, by so much was the owner of the property in-
" jured. But there is a very wide distinction between giving
" damage for such remote and possible injuries, and com-
" pensating the owner for the actual depreciation of his
" property, because of its exposure to such hazards and
" dangers. Whatever may cause the depreciation, the loss
" to the owner is the same. If, in consequence of its ex-

" posure to these remote injuries, the property is dimin-
" ished one-half in value, then this decrease in value meas-
" ures the actual loss to the owner. And, when compen-
" sated for this depreciation in the value of his property,
" he is not receiving compensation for some imaginary
" injury, some fanciful loss, which may or may not occur,
" but he is paid for a real loss which he sustains by the
" building of a railroad across his property. If the con-
" struction of the road across his land depreciates the
" property one-half its value in the market, then he is
" damnified to this extent. It matters not what causes
" the depreciation in value, whether exposure to fire, an-
" noyance from trains, or danger to person and property,
" the real question is, whether in consequence of the rail-
" road the property is diminished in value; and if so, how
" much; for this will measure the direct and necessary
" loss which the owner has sustained by the construction
" of the road over his land. And all that the witnesses
" were asked to state was, how much less was the mar-
" ket value of the farm in consequence of the railroad
" crossing it; and they were allowed to state their opinion
" upon that point, together with the facts or reasons upon
" which that opinion was founded. We think the evi-
" dence was competent for the purpose for which it was
" allowed, and and that in no other way was it possible to
" bring before the jury such facts as would enable them
" to render a verdict for the proper damages.

" It is proper to add that the court directed the jury
" that they must disregard all testimony tending to prove
" remote and speculative damages, and only give the re-
" spondents such sum as would indemnify them for the
" loss they had sustained in consequence of the construc-
" tion of the road across the farm. The jury, in estimat-

" ing the extent of the injury to the property, were ex-
" pressly told that the respondents were entitled to recover
" only for the direct damage resulting from the construc-
" tion of the road."

See, also, *I. & W. R. R.* v. *Von Horn*, 18 Ill., 257.

C. & E. R. R. v. *Blake*, 116 Ill., 163.

II.

It is claimed that the verdict is " grossly excessive."

This was one of the grounds urged for a new trial. It is hardly necessary to cite authorities to show that a court of appeal will not reverse on this ground, unless the excess is so gross as to strike the mind of the Court at once as manifestly unjust and not sustained by the evience.

The mere fact that the witnesses of plaintiff and defendant disagree is not enough, nor is the fact that defendant's witnesses called as experts are of the opinion that plaintiff sustained no damage whatever, sufficient.

In cases of this character there are always the marked discrepancies here shown, and defendant can not be heard to complain in this court that the jury preferred to believe the plaintiff's witnesses rather than those of the defendant. In fact, it is but natural they should when defendant's witnesses express the opinion that a construction of this kind not only was no injury, but on the contrary a positive benefit to the plaintiff's property. An opinion so extreme, in view of the facts, must naturally tend to discredit the testimony of the witness who expresses it.

For the same reason the evidence that the effect of the construction of the viaduct above the level of the proper-

ty, with a narrow inclined plane along the line of this property, was to cut off the passage of persons along and in front of this property was competent. It affected the value of the property permanently by making it less accessible from the street. Access to a public street constitutes the main value of city property, and in cases of this class accessibility is the important question in determining the effect of the construction.

With the facts before the jury, with the maps and profiles showing the construction of a bridge in the street far above the level of plaintiff's property, it would strike the average man as a self-evident fact that plaintiff must have sustained some damage, and the only question was, How much? There was abundant evidence to sustain the verdict. Briefly stated, the evidence of plaintiff below on this point is as follows:

First, as to the value of the property prior to the building of the viaduct. The court in its instructions reviews this testimony and states the value of the property as testified to by the several witnesses on behalf of the plaintiff, as follows:

Robert Law	$48,000.00
Lyman Baird	46,000.00
Mr. Higginson	42,000.00
Mr. Gaubert	47,575.00
Mr. Philpot	48,000.00

They testify that the construction of the viaduct damage the property to the following extent:

Mr. Law	50 per cent.
Mr. Baird, total damages	50 per cent.
Mr. Higginson	40 per cent.
Mr. Gaubert	40 per cent.
Mr. Philpot	40 per cent.

Taking the lowest valuation, that of Higginson, $42,000.00, and the lowest estimate of damages by the original construction of the viaduct 40 per cent., and we have $16,800.00 as the damage to the whole lot. At the time of the original construction of the viaduct, plaintiff owned two-fifths of the lot, which would make his damages two-fifths of $16,800.00, or $6,720.00. This is without taking into consideration the additional damages caused by the subsequent raising of the viaduct, which was stated to be from 10 to 15 per cent.

Taking the highest valuation, $48,000.00, and the highest percentage of damage from the building of the viaduct alone, without considering the subsequent raising, and plaintiff would have been entitled to a verdict of $9,600.00.

The jury therefore did not render a verdict without due consideration, and upon the motion for a new trial it did not strike the court below as excessive, or contrary to the evidence, and it has not been the practice of this court to disturb the verdict or judgment of the lower court where the questions or facts have been fairly submitted to a jury and approved by the court, upon the mere claim that the amount is excessive.

III.

We come now to the instructions of the court.

Plaintiff in error claims that the court refused to instruct the jury in several particulars as requested.

The first of these propositions is No. 5 (page 47, printed record), which reads as follows:

" That only such damages can be recovered in this ac-

"tion as have been done to the market value of the "property by rendering to the access to the property dif- "ficult or inconvenient, and that all testimony as to the "flooding of the premises in question with water from "said viaduct bridge, and approaches must be disre- "garded by the jury."

The purpose of this instruction was to exclude from the jury the evidence of damage caused by water.

The court's attention was specially called to this question and he thereupon instructed in substance that if the flooding impaired the value of the lot, its selling value—the jury might consider it as an element of damage, but that if it merely produced a temporary inconvenience to the present occupant, it was not an element of damage. (Printed Rec., 54).

Under the authorities already cited upon this question there can be no doubt that the law was stated correctly.

If the building of the viaduct, damaged the property permanently, every element that entered into such damage resulting from the erection of the viaduct, was proper for the consideration of the jury.

This must follow necessarily from the rule that the city was bound to make "just compensation" for property damaged for the public benefit.

Plaintiff in error complains that the court refused to instruct as requested in his ninth proposition, which is as follows:

"That any effect of the construction of the viaduct "upon the value of the property in diverting public "travel along 18th street to the said viaduct and "from the property in question, cannot be considered

"in this case, and forms no proper cause for recovery by "the plaintiff."

It will be observed that the court did instruct upon this point (and this is also objected to).

The court told the jury in substance that if the defendant had opened another thoroughfare, and the public chose rather to take that one than to go on this, that is not an element of damages, but the jury were to say whether the carrying of the travel above the surface of the lot, so that they do not come in contact with it, has diverted business to such an extent from the lot as to impair its market value. (Rec., 150, Printed Rec., 54).

This is undoubtedly good law. This case is not a case where the damage is caused by the opening of another thoroughfare in another place, the effect of which was to divert travel from the street adjoining plaintiff's premises, and the authorities applying to such cases can have no application here. It is evident that in the case supposed, the law must be that a property owner could not complain of the indirect damage to his property by the opening of some other street more accessible to the public, where the surroundings of his property remain *in statu quo.* To hold otherwise would be to prevent the public opening new thoroughfares a mile away, if their effect would be to divert the travel upon some old traveled road. The reason of the rule is obvious.

But that is not this case. Here the plaintiff in error has destroyed the street which gave value to the property in question, and has obstructed it by a so-called improvement, which, though it may convenience the public in crossing railroad tracks, has left the property of defendants in error some twenty feet below the level of the

roadway, and cut off all access to the old street, permitting access to the new only by an inclined plane along the line of this property. Surely if the effect of this is to prevent all travel from passing by the property on the *old* road, and to make the property less accessible from the new, so as to permanently affect its value, this is a proper element of damages. This case is not at all analogous to those cases where there has been a diversion of travel by a new thoroughfare, and the principle of those cases cannot be applied to this.

Plaintiff in error also objected to that part of the instruction of the court which reads as follows:

"The real question is, Has the market price of this "property been reduced or diminished. As bearing upon "this question, proof has been offered upon the part of "the plaintiff tending to show that it is not as good a "stand or location for the coal business or the busi-"ness which has been heretofore carried on at "this place as it was when the travel passed along "18th street, directly by the lot, instead of going "along on the viaduct above the lot, as it does now; that "not so many orders are taken in for coal at the office "there, and not so large a business of distributing coal "from that point has been done. The evidence is also "offered on the part of the plaintiff tending to show that "by reason of the raising of the grade on Lumber street "and Stewart avenue, directly upon the west front of this "lot, at the time the bridge was raised, in 1881, it is more "difficult to haul loads from the lot onto the adjacent street, "and that thereby much more embarrassment and ex-"pense followed for the transaction of this particular kind "of business on this lot." (Rec., 144.)

We think the court has stated the rule of damages

correctly. The cases already cited declare that the question is, What was the effect upon the market value of the property? Has it been injuriously affected by the building of the viaduct? The reference to the effect upon the coal business could not have been misunderstood, because the court states distinctly that this testimony was offered as bearing upon the question whether or not the market value of the property has been affected; and in another part of his instructions (Rec., 145; Printed Rec., 52) states clearly how far the effect upon the coal business is to be considered. He says: "It may be that "it can no longer be used for the purposes of a coal-yard, "or for any purpose for which it has heretofore been "used, but that would not be material if it can be rented "or sold at as good a price for other purposes, except "that if the proof satisfies you that any of the permanent "improvements put on the lot for the particular business "which has been heretofore carried on there, and for "which it was improved, have been impaired in value, or "are not worth as much after this viaduct was built and "the bridge was raised as before, and you can from the "proof determine how much these improvements are "damaged, the plaintiff would be entitled to recover for "such damage to the improvements—that is to say, this "lot being improved for a specific purpose, if the proof "satisfies you that it can no longer be rented or used "for that purpose, and that thereby these improvements "have been lost or impaired in value, then the impair-"ment of value to these improvements is one of the ele-"ments of damage which the plaintiff is entitled to have "considered and passed upon, and included in his dam-"age."

Upon a review of the whole case we think this court

must conclude that substantial justice has been done; at least, so far as plaintiff in error is concerned, and if the court arrives at that conclusion, then under the practice of this court the judgment will be affirmed; for mere technical errors are not sufficient in this court to reverse a judgment which appears to be just. But we believe the record to be free from even technical errors. The questions after all were for the jury, whether plaintiff below had sustained any damage, and if so, how much. The law pertaining to the case is well established in this state, and is as stated by the court. The courts of this state having construed our constitutional provision and determined what are proper elements of damage under it, we believe that this court will regard them as "of special "weight, if not conclusive," on this court, as was said of the construction and decisions of Wisconsin in the case of *Pumpelly* v. *Green Bay Co.*, 13 Wall., 166.

The evidence having been fairly submitted to a jury, and, although conflicting as to the amount of damages, as it always is in such cases, it was for the jury to harmonize the various opinions of the expert witnesses, as only a jury can, and plaintiff in error must abide by the result, however much it might have desired a different one.

Since writing the above we have been furnished with the brief of counsel for plaintiff in error, and we desire to add to what we have said a few words in reply.

The errors that counsel seems to rely upon are:

First. That the court below allowed the plaintiff to recover for damages because of the diversion of travel from

that portion of the street immediately in front of plaintiff's property.

Second. That the court admitted evidence of the interruption of business and loss of profits.

Third. That the court erred in allowing evidence as to every element of damage incident to the structure.

Upon the first point we think this court will readily see that the authorities cited by counsel have no application to this case.

In all of the cases referred to the damages claimed arose from the opening of new thoroughfares, and there was no *direct* interference with the property of the plaintiff. The damages were "too remote and contingent "to be susceptible of accurate compensation."

In none of them was there an obstruction placed in a street adjoining the property claimed to be damaged, the *immediate* and *direct* effect of which was to take away from the owner the access to the street which he had formerly enjoyed and to inflict upon him damages peculiar to the location of the structure upon a street adjoining his property. It is in this latter class of cases that it has been so frequently held that the owner may recover.

Plaintiff below might not perhaps be allowed to complain if the city had merely provided a *better* passageway on the opposite side of 18th street, on private property as supposed by counsel, *if* the old street had remained, but this is just the distinction between the cases cited and the one at bar. The complaint here is not that travel is diverted to a better passageway, but that the access to the property from the street has been rendered so difficult as to impair the value of the property.

The Illinois cases cited by counsel clearly show in what cases damages may be recovered, and why the cases referred to do not fall within the rule.

For instance, in the case of the *City of Chicago* v. *The Union Building Assn.*, 102 Ill., 379. The court say:

"Appellee's building and lot are some three and a half "blocks distant from the part of La Salle street pro- "posed to be vacated and closed up. It is not, nor could "it reasonably be claimed that the closing up of this por- "tion of the street in any degree interferes with access "to appellee's lot, or with its use and enjoyment. The "streets adjacent to it all remain in the same condition as "to width, character of improvements, etc., that they "were in before, and it is not pointed out how appellee "will be otherwise specially or peculiarly injured by the "proposed closing up of the portion of the street in ques- "tion."

But the court approves the doctrine of the Rigney case.

The case of *Provision Co*,. v. *City*, 111 Ill., 651, was for damages caused by building the identical viaduct here complained of. No fault is found with the judgment against the city. The plaintiff in the suit appealed and complained that judgment was not also obtained against the railroad which contributed to the expense of building the viaduct.

The case of *City of Chicago* v. *McDonough*, 112 Ill., 85, was also for damages caused by the erection of a viaduct.

That case is somewhat similar in its facts to this, so far as the location and surroundings of the property are concerned. There is no intimation in the case of any intention by the court to change the rule laid down in the Rigney case.

The court approves an instruction which contains this "language, and the question for the jury to determine is, "whether any and if so what damage has been occasioned "by the construction of the Harrison street viaduct and "its approaches to the premises in question." * * *

The case of *East St. Louis* v. *O'Flynn*, 119 Ill., 200 (cited on page 23 of brief for plaintiff in error) appears from counsel's statement of it to be wholly inapplicable. The street vacated and for which damages were claimed was not adjacent to the plaintiff's property, and did not interfere with his access to the adjoining streets.

In regard to the evidence as to the interruption of business and loss of profits, we believe we have made ourselves clear already.

In addition to the Wisconsin case cited upon this point we call attention to another case in that state:

Driver v. *W. U. R. R.*, 32 Wis., 569.

In that case the plaintiff was allowed to show the business transacted upon the property and the effect upon such business, as bearing upon the question of damages, and showing the depreciation in the value of the property.

So in the case of *L. S. & M. S. Ry.* v. *C. & W. I. R. R.*, 100 Ill., 21, already cited, which was a proceeding to condemn a right of way by one railroad across the right of way of another, the court say: "Evidence as to the "amount of traffic was legitimate, to show the extent of "the use to which this strip of land would be subjected "in the operation of the road, and to what extent it "would injure the adaptability of the two blocks for "transfer uses, as affecting the questions of depreciation "of their value, and damage to other railroad property. "There evidently was no purpose to show mere damage

" to business, but damage to the capacity of the property " for the use."

This was the object and purpose of the evidence complained of in this case, and it was not full enough to serve any other. No facts were given from which any estimate of profits could have been made.

Counsel object to the ruling of the court in allowing evidence generally as to the damages resulting from the erection of this viaduct.

The evidence of the experts is as to the effect of the viaduct upon the market value of the property. By the instructions of the court, the damages were limited to such as legitimately resulted from this erection. Under the cases cited, plaintiff below was entitled to recover such damages.

But counsel contend that the constitution of 1870 permits damages only " when but for some legislative enactment, an action would lie by the common law."

Suppose counsel to be right in this, could not a property owner recover at common law for an obstruction of a highway adjoining his property? We think there can be no doubt that he could. It has even been held that he could recover loss in his business in consequence of passengers being diverted from the thoroughfare by defendants continuing an authorized obstruction across it for an unreasonable time.

Wilkes v. *Hungerford Market Co.*, 2 Bingham's N. C., 281.

There was no diversion of travel in the case at bar within the meaning of that term as used in the cases cited by plaintiff in error. On the contrary counsel contends

that travel has been increased along this viaduct. It is the difficulty of access that injures the property.

What elements of damage were there that should not have been considered by the jury in this case?

Counsel does not specify them. What damage is there which plaintiff below should suffer in common with the public and for which he cannot recover? Counsel claim that the viaduct is a great public benefit, that the public generally have been able to use the street with greater convenience and safety in crossing railroad tracks. How then has the public in general sustained any injury by it? How can defendants in error be called upon to share in a general public damage which has not been sustained by the public? If the general public has been benefited by an improvement at the expense of defendants in error, it would seem but just that the general public should compensate them for their loss. And this is the spirit of the constitutional provision.

It is hardly necessary for us to discuss here the wisdom of this constitutional provision, and yet we can not refrain from noticing counsel's view of this subject.

We fear that long association with municipal corporations may have biased the minds of the learned counsel and led them to believe that such a corporation is an entity foreign and antagonistic to the citizen, instead of being the trustee and guardian of the rights of the individual. Such notions do sometimes creep into the natures of those who for a series of years have been forced to combat the obstinate citizen, who demands his rights and is willing to fight for them.

Whether, if a new constitutional convention were called to-day in the State of Illinois, it would refuse to incorporate

this provision in the organic law as counsel seem to think, we do not know. But we hope the people of this state would not fail to provide the necessary limitations and restrictions upon the rapacity of office-holders and put sufficient restraints upon the power of common councils to prevent the property of a private citizen being sacrificed for the benefit of the public at large or the convenience of some body of citizens, who might be willing to have their own property improved at the expense of their neighbors.

We do not agree with counsel that this provision has interfered with public improvements, or that it has been found to be unwise and impolitic. From our standpoint it seems a most wise and just provision, and its beneficent hand has been extended in many cases to ward off impending ruin to the owners of property.

Nor is the city without the means of protection, for where the improvement is demanded and made for the accommodation of a railroad or other bodies of citizens associated together, it is proper and practicable for the city to require them to contribute to the expense, as was done in this case under the ordinances of the city (Rec., 40–45) and it may require protection against claims for damages to private property.

When the improvement is really needed by the public interest, and is for the convenience of the public, the public are willing and able to pay the whole expense, and they ought to be compelled to do so.

But the wisdom and policy of the law are not in issue here. Counsel admit that under the constitution and decisions of Illinois, defendants in error were entitled to recover for damages occasioned by the flooding of the premises, and the consequential damages for cutting off or de-

stroying the access to and from the property (see brief of plaintiffs in error, page 26) so that after all the question is narrowed down to the point whether or not the verdict was for more than it ought to have been. Upon that point we believe there can be no doubt. The evidence sustains the verdict, and we feel confident that the court below stated the law correctly.

Respectfully submitted.

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